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ENGLISH LEGAL TRAINING

A Critical Survey *

I. Introductory

The subject of legal education is one which has aroused singularly little interest in England in recent years and the general professional attitude to it is one of complacent apathy. It is never thought worthy of discussion at general meetings of the Bar or the Law Society, no changes of a fundamental nature have been made in the last twenty-five years and there is an astonishing paucity of published material on the topic.[1] This professional complacency is in striking contrast with the position in the other common law jurisdictions, particularly in the U.S.A. and Canada where the subject is perhaps the most widely debated of any legal topic. It has been discussed at almost every meeting of the American and Canadian Bar Associations and the best of the law schools are constantly experimenting with new courses and teaching methods and attacking each other's ideas [2] with a freedom which is in refreshing contrast with the back-scratching prevalent in academic circles here. The published material is embarrassing in its profusion; it is quite common for a whole issue of a law review to be devoted to it,[3] and a special Journal of Legal Education is published

* A much abbreviated version of this monograph was delivered as an Inaugural Lecture at the London School of Economics and Political Science on January 24 last, with Lord Justice Denning in the Chair. This accounts for the fact that it is written mainly in the first person singular and I have thought it better not to alter this, since it does not purport to be other than an expression of personal opinion. I am greatly indebted to Prof. A. D. Gibb, K.C., of Glasgow, the late Prof. Sidney Post Simpson of New York, Prof. W. Friedmann of Melbourne, Prof. J. L. Montrose of Belfast, Dean C. A. Wright of Toronto, Mr. I. D. Campbell of New Zealand, Mr. E. R. Dew, Principal of the Law Society's School of Law, Mr. H. Street of Manchester, the Under-Treasurers of the Inns, the Under-Secretary of the Law Society and the Librarian of the Institute of Advanced Legal Studies for their generous response to my requests for information. I am also indebted to all my colleagues and especially to Lord Chorley, the late Prof. J. H. Laski, Dr. O. Kahn-Freund, Mr. A. Goodman, Mr. C. Grunfeld, Mr. S. de Smith and Mr. D. H. N. Johnson for their invaluable advice and criticisms.

[1] As would be expected *The Journal of the Society of Public Teachers of Law* generally contains at least one article on the subject, but it is rare to find anything on it in the L.Q.R., M.L.R., the Cam.L.J. or the weeklies.

[2] See, *e.g.*, 1 *Journal of Legal Education* (hereinafter cited as J.L.E.), p. 28, especially p. 33 *et seq.*

[3] See, *e.g.*, 43 Col.L.R. 423–485; 30 Iowa L.R. 326–441; 13 Can.B.R. 347–417; 28 Can.B.R. 117–196.

quarterly, each issue containing at least twice as much as any annual number of our *Journal of the Society of Public Teachers of Law*. There are also a number of full-length works of which the three recent publications of the Russell Sage Foundation [4] are particularly valuable. It has been discussed by a special inter-university conference of students,[5] and a seminar on legal education is part of the curriculum at Columbia.[6] Finally, the American and Canadian Bar Associations, realising that it is useless to try to reform legal education unless one really knows what lawyers do, are at present conducting elaborate surveys of the legal profession (expected to take five years to complete) designed to ascertain the exact functions which a lawyer now has to fulfil in a democratic society, whether as judge, government official, practising attorney or law teacher.[7]

Meanwhile the English lawyer remains blissfully ignorant of this ferment working among his colleagues across the Atlantic, rarely discussing the problem or apparently realising that there is a problem to discuss. The Council of Legal Education, the Law Society and the Universities periodically make trifling changes in their curricula, and occasionally an academic lawyer, greatly daring, suggests something a little more radical, such as the introduction of the study of comparative law. But that there may be anything fundamentally wrong with our present system of legal training is a point of view which scarcely occurs to lawyers, academic or practising. The present state of training for the Bar has, it is true, been subjected to fairly general criticism, the Solicitors' Final Examination has not escaped abuse and recently Sir Arnold McNair [8] and Professor E. C. S. Wade [9] have expressed vague disquiet about university teaching, but for a radical attack on our system as a whole we have to turn to the works of those writing as laymen rather than as lawyers, such as Sir Alexander Carr-Saunders [10] and the late Professor Harold Laski.[11]

Is our comparative complacency justified? Are our American colleagues making a fuss about nothing, or is our system so superior to theirs?

[4] *Law Training in Continental Europe*, by Eric F. Schweinberg (New York, 1945), *Lawyers and the Promotion of Justice* (New York, 1938) and *Lawyers, Law Schools and the Public Service* (New York, 1948), both by Esther Lucile Brown. See also Karl N. Llewellyn, *The Bramble Bush* (New York, 1930), and Jerome Frank, *Law and the Modern Mind* (New York, 1930, reprinted Stevens & Sons, London, 1949).

[5] For its reports see 1 J.L.E. p. 64 *et seq.* and p. 221 *et seq.* See also the Report of the Inter-Professions Conference on Education for Professional Responsibility (Carnegie Press, 1948).

[6] The bibliography for this course lists nearly 100 major American contributions.

[7] For the latest position regarding these surveys, see 34 A.B.A.J. 16 and 27 Can.B.R. 951.

[8] (1934) J.S.P.T.L. 1.

[9] 9 Cam.L.J. 286.

[10] *The Professions* (with R. A. Wright), 1933.

[11] See especially *The American Democracy* (1949), p. 371 *et seq.*

Historical Introduction

Before attempting to answer these questions I must indicate how our present system has grown up and exactly what it is. Happily a lengthy historical account is unnecessary because the present system is little over 100 years old. Until the seventeenth century there was of course a reasonably thorough system of education carried out by the Inns of Court and Chancery but by the early eighteenth century this had ceased and 'keeping terms' no longer meant attending readings and taking part in moots but merely, as it does today, eating dinners. But because the Inns had originally been the legal university, and were habitually so described in the literature of the sixteenth and seventeenth centuries, Oxford and Cambridge had never seriously attempted the teaching of English law and by this time even the teaching of Roman civil law was virtually dead. It sometimes seems to be assumed that university law teaching was revived by Blackstone and grew steadily from his time onwards, but this impression is false. His Commentaries in book form had a lasting influence but the example of his oral lectures was short-lived.

In the early part of the nineteenth century [12] therefore the position was that neither for the Bar nor for solicitors (by which expression I include attorneys) was there any organised training. For call to the Bar the *de jure* qualification consisted of the ability to eat and drink and to sign one's name, *de facto* it involved, according to a contemporary description, 'going into a pleaders' office for two or three years to learn to tell a plain story in very unintelligible language'.[13] For a solicitor also the only training was practical apprenticeship, and in his case without gastronomical consolations. Such instruction as the student obtained therefore depended entirely on his own initiative and that of his principal. There was no test of educational proficiency either general or legal and if he sought guidance from lectures or classes he would be unlikely to find it. It is true that both Oxford and Cambridge boasted two Chairs of Law and gave degrees in Civil Law which were essential for admission to Doctors' Commons and practice before the ecclesiastical courts, but at Oxford the Chair of Civil Law was a complete sinecure and the Regius Professor at Cambridge only delivered an occasional lecture. 'No degrees were given in English law and whether its Professors did anything depended on

[12] Except where otherwise stated the facts and quotations which follow are taken from the Reports or Evidence of the Select Committee of 1846 and Royal Commission of 1854, referred to below. See also *Law Society's Handbook*, pp. 15–22; Holdsworth, *H.E.L.*, vol. xii, and Bellot, *University College, London, 1826–1926*, p. 96 *et seq.* For the later history, see 51 L.Q.R. p. 162; 15 Can.B.R. 151; Carr-Saunders & Wright, *op. cit.*

[13] Quoted by Joseph Napier, Q.C., in Commons Debate, March 1, 1854. The sneer hardly does justice to the discipline instilled by the science of special pleading, which, despite its defects, probably had some merits which the present 'reading in chambers' lacks.

them. In 1846 the then Vinerian Professor at Oxford stated that he gave a course of twenty-four lectures on common law at which attendance was optional and small, and the Downing Professor at Cambridge said that he had never delivered any lectures at all. One place at which some sort of systematic instruction in law was given was, rather surprisingly, at Haileybury, the training college of the East India Company, but this was necessarily superficial and was not available to the would-be English practitioner. It seems too that one or two enterprising practitioners, the forerunners of the present law coaches, gave occasional courses of lectures in their chambers, but this could only have been on a very small scale.

That the whole system (or absence of system) was in need of reform was widely realised. Under Benthamite influence it was an era of reform and an able and active minority of distinguished lawyers, such as Brougham, Bethell, afterwards Lord Westbury, Campbell and Cairns, were trying to bring home to their colleagues the need for radical alterations. As Campbell said, in his Life of Lord Mansfield,[14] 'I conceive that in regard to the great mass of students entering a learned profession, it is necessary by institution and discipline, to guide inexperience, to stimulate indolence, to correct the propensity to dissipation, and to have some assurance that these intrusted with defending life and property are decently well qualified for the duties which they may be called upon to discharge'. As a statement of the basic objects of legal education this has scarcely been bettered to the present day—but now the austere influence of our statesmen and economists has made it less necessary for us to concentrate on correcting a propensity to dissipation.

The influence of these reformers had its effect. The Law Society introduced lectures for solicitors' articled clerks in 1833 and their example was followed by various local societies. The Inner Temple tried in the same year to introduce compulsory lectures for its students, but the requirement was of doubtful validity and in any case the only result was that students joined one of the other Inns. The first legal examination was that for admission as a solicitor introduced in 1836 and made a statutory requirement in 1843, but at a very early date this examination became the target of criticisms which have continued to the present day. Its questions were said to be 'wholly beside the mark, and an examination even if successfully passed is no fair criterion of a young man's knowledge, and if he was plucked at that examination it would be no proof of his ignorance'. That has a familiar ring. The Inns of Court did not introduce examinations until 1844 and their requirements were not uniform until 1852 when the forerunner of the present Council of Legal Education was set up with Westbury as its first chairman.

[14] *Lives of the Chief Justices*, 3rd ed. 1874, Vol. 3, p. 186.

From then until 1872 the system was that Bar students could *either* attend lectures *or* submit to an examination, and needless to say nearly all students chose lectures as the lesser of the two evils. It appears that two students had the temerity to present themselves for examination as well; they were ploughed ignominiously but established their right to be called to the Bar notwithstanding!

At the present day we are so hag-ridden by examinations that it is difficult to realise that the whole examination system, whether in schools, universities, or for the professions, is little over 100 years old. The law, in comparison with other professions, was not unduly late in introducing it, and after its first timid advances it has certainly embraced it passionately.

The first step in the revival of university instruction came from the newly formed London University. This granted degrees on the basis of a written examination in Jurisprudence which was given a wide meaning virtually equivalent to General Principles of English Law. At first only four or five students took a degree annually, but at University College well-attended courses on Common Law were delivered by Professor Amos, and less well-attended ones by John Austin. If the latter was jealous of his more popular colleague, time has avenged him for, although Amos was a lawyer of great distinction in his time, his lectures are now forgotten while Austin's are still read (or at any rate quoted). It seems that Amos [15] had informal discussions with his students after lectures, so perhaps he may be regarded as the father of seminar classes which play such an important part in legal education today.

The first major triumph of the reformers was in securing the appointment in 1846 of a Select Committee on Legal Education. The Committee cast their net very wide and took evidence, and published it, from the universities, the Inns of Court, the Law Society, the Continental countries and America. It is not surprising that their Report [16] was severely critical. They said that 'the present state of legal education, both professional and unprofessional, is extremely unsatisfactory and incomplete and in striking contrast and inferiority to such education in all the more civilised States of Europe and America. The student is left to his own individual exertions and no legal education worthy of the name of a public nature is to be found'. To remedy this they recommended on the academic side a great extension of law teaching at universities and rigorous examination tests. For professional training they adopted a suggestion made by Westbury that the Inns of Court should co-operate to form one great legal university providing full courses of lectures and discussions with a thorough examination system. So far as training for the Bar was concerned entry to the Inns should

[15] See his evidence before the 1846 Committee.

[16] B.P.P. 1846, Vol. 10. (The Report appropriately shares the volume with one on the Disposal of Metropolitan Sewage Manure.)

be preceded by an examination test of general education and there should be a final qualifying examination after completion of the courses at the legal university. The latter's courses should also be open to articled clerks and should be supplemented by lectures organised by the Law Society on topics more special to the solicitors' branch. Here too there should be an examination before entry into articles and the final qualifying examination should be conducted more in reference to general principles than technicalities 'as appears now to be the case'. It should be within the powers of the governing bodies of the two branches to admit certificates of attendance at university lectures as exempting from their own.

This project for a combined legal university is so rarely considered today that it is difficult to realise that it was one of the most controversial topics of legal discussion for the next seventy-five years. It was always one of Westbury's most cherished projects, but in one respect the Select Committee had gone further than he was prepared to do. As we have seen they had suggested that the combined university established by the Inns should also instruct solicitors' articled clerks, but Westbury, who for all his greatness, was a bit of a snob, was not favourable to this association of the lower branch. However, the main obstacle to be overcome before anything could be done was the apathy of the Inns of Court, and the reformers therefore followed up their initial victory by securing the appointment in 1854 of a Royal Commission 'To inquire into the arrangements in the Inns of Court for promoting the Study of the Law and Jurisprudence, the Revenues properly applicable and the means most likely to secure a systematic and sound education for students of Law and provide satisfactory tests of fitness for admission to the Bar'.[17] Westbury, then Solicitor-General, played a major part in the Commons debate which led to the appointment of the Commission, his speech in which he characteristically contradicted his more conservative Attorney-General (Cockburn), being one of his most famous parliamentary performances.[18] It is easy to detect his hand in the draftsmanship of the terms of reference: on the one hand these made unavoidable an investigation of the Inns' finances (Westbury had long been critical of what he regarded as the misuse of their funds [19]), on the other hand by restricting inquiry to Bar education it avoided any possibility of embarrassing proposals for co-operation with solicitors. As Westbury was a member of the Commission and inevitably the dominant personality upon it, it is not surprising that it was largely concerned with his pet scheme and it reported strongly in favour of uniting all the Inns into one great legal university which would teach and examine for call to the Bar and also grant degrees of LL.M. The Commission laid

[17] B.P.P. 1854–5, Vol. 18.
[18] *Hansard*, March 1, 1854.
[19] See his letter to Lord Langdale quoted by his biographer: Nash, *Life of Lord Westbury*, Vol. 1, p. 91.

down the heads of a scheme in some detail but left somewhat obscure the exact basis of collaboration with the existing universities. It suggested that the qualification for entry to the new university should be a special preliminary examination or a university degree in Arts or Law, but it is not clear whether it would have supported the 1846 Committee's proposal that attendance at university lectures might exempt from the professional courses. It is interesting to note that the future Lord Cairns in his evidence went even further and suggested that university degrees should exempt from the professional examinations. The commissioners, although fully sharing the views on the inadequacy of the existing system, on the whole let the Inns off lightly. They reported that by reason of a grant of James I the properties of the Inner and Middle Temples were held on charitable trusts for professional purposes, but that the position of Lincoln's and Gray's Inn was doubtful, and after a full investigation of the finances of all four Inns they concluded that there was no proof of any misuse of their funds. As regards the Inns of Chancery they could find no evidence of any charitable trusts affecting their properties.

For a time after the Commission's Report the project for a combined legal university fell into abeyance, but in 1868 at a meeting of the Law Society it was revived in a wider form to include solicitors also. To sponsor it the Legal Education Association was formed under the presidency of Sir Roundell Palmer (afterwards Lord Selborne), the favourite disciple of Westbury, then in eclipse as a result of the unfortunate scandal which marred his later career. The scheme was unanimously approved by the Law Society, subject to an assurance that there should be no discrimination against solicitors. But if the lower branch saw in the project an opportunity of improving their status, the Bar led by Sir George Jessel, viewed it with suspicion as an attack on their ancient privileges and exclusiveness. In 1871 and 1872 Selborne moved a resolution in its favour in the Commons but this was lost on a division by the narrow majority of 116–103. Nevertheless Selborne persisted and prepared a draft Bill which the Law Society supported financially and this he introduced as Lord Chancellor in 1873 and 1874, and, when in opposition, in 1875 and 1876. His tactics were perhaps at fault; for not content with introducing this Bill (and being largely responsible for the Judicature Acts) he introduced another designed to reform the Inns of Court generally, and this reforming zeal enabled the more conservative elements to close their ranks and to represent poor Selborne as a dangerous revolutionary and the dupe of unscrupulous attorneys. He was also, I regret to say, opposed by London University, who saw in his scheme danger to their own struggling law school. In the following year Cairns, the new Lord Chancellor, stole Selborne's thunder by introducing a compromise measure known as the Bar Education and Discipline

Bill which Selborne was induced to accept but which was never carried further. Once again the project fell into abeyance, the Legal Education Association was wound up and in 1901 its remaining funds (£170 Consols) handed over to the Law Society where they now constitute the Clabon Prize Fund.[20]

Although this appeared to be the end of the original project, there were during the last quarter of the nineteenth century various schemes for re-organising the existing London University or forming a second university in the metropolis and suggestions were made that the Inns of Court and the Law Society should be associated in it together with other professional institutions such as the Royal Colleges of Physicians and Surgeons, but neither the Bar nor solicitors showed enthusiasm for these suggestions and nothing came of them. Later still, the Commissioners under Lord Davey set up under the University of London Act, 1898, suggested to the Inns that they or the Council of Legal Education on their behalf might become schools of the University, but this invitation only met with a curt refusal.

In 1904, however, the original project for a specifically legal university was dramatically resuscitated. During the nineteenth century the moribund Inns of Chancery had been liquidated one by one and their funds distributed among the handful of members. The Law Society had protested on the sale of Clement's Inn and had tried unsuccessfully to persuade the Attorney-General and the Charity Commissioners to intervene. In view of the report of the 1854 Commission their failure was not surprising. However, on the sale of New Inn in 1901 they were successful in inducing the Attorney-General (Sir Robert Finlay) to take action and they financed the case of *Smith* v. *Kerr*[21] as a result of which the court declared that the funds were subject to a charitable trust for legal education and directed the preparation of a scheme for their administration. The members of Clifford's Inn then voluntarily parted with the greater part of the proceeds of the sale of their hall and as a result a total of £150,000 became available and Finlay prepared a scheme which was in effect Westbury's and Selborne's long cherished project for a National Legal University. At last it appeared that the scheme was to bear fruit. It was accepted by the Law Society and by at least two of the Inns, but Inner Temple would have none of it and finally it was rejected by the Bar Council.[22] Without the co-operation of the Bar it was obviously impracticable and Finlay was forced to abandon it. Instead a

[20] For Selborne's own account, see *Memorials, Personal and Political*, Vol. 1, p. 47 *et seq.* He attributes his failure to ' jealousy on the part of the University of London . . . ; the inert and suspicious conservatism of the Inns of Court; and a strong prejudice against bringing together, under one system of education, future barristers and solicitors '.

[21] [1902] 1 Ch. 774.

[22] See Annual Report, 1903–4.

provisional scheme (which still operates) was approved under which the income of the New Inn and Clifford's Inn Funds is divided equally between the Council of Legal Education and the Law Society. For a few more years the annual reports of the Law Society continued to refer hopefully to the original project; Finlay went on advocating it [23] and Dr. Edward Jenks, always an optimist, writing in the *Law Quarterly Review* in 1907 [24] said that 'there can be little doubt that the broad lines of Sir Robert Finlay's scheme will ultimately be found the solution of the problem'. It was supported by Professor Goudy in his presidential address to the Society of Public Teachers of Law in 1919 [25] and the Law Society made a further attempt to revive it in 1922 and 1923, in which years an interesting correspondence appeared in the *Law Journal*.[26] This however seems to have been its swansong. The original project had become confused with a rather different scheme for an Imperial Law School where the laws of the Empire might be studied, a proposal which seems to have originated from Lord Russell of Killowen in an address to Nottingham law students in 1900.[27] In the early 1920's professional interest appears to have shifted from the idea of a professional law school to that of an Institute for Advanced Studies into the laws of the Empire [28] and in 1927 a departmental committee under Lord Atkin was appointed to consider this. It never reported, but the idea was one of the sources which ultimately led to the establishment of the Institute of Advanced Legal Studies.

So much for the history of the ill-fated law school project. In the meantime, of course, things had not stood still in other directions; the universities, the Law Society and, to, a lesser extent, the Council of Legal Education had all made serious attempts to organise their teaching and to revise their examination requirements. Both professional bodies had, for example, introduced an educational test as a prerequisite to admission as a student and as this has now become in effect the universities' matriculation there is in this respect a common standard. But unhappily in most other respects the two professional bodies had developed independently of each other and of the universities. Each had established independent law schools in London providing instruction by lectures and classes for their separate professional examinations but attendance at those for the Bar was (and still is) purely optional. The Law Society went further and in 1922 introduced compulsory attendance at a law school for one year. Since they were unable on their own to organise schools throughout the country they

[23] See (1921) 56 L.J.News. 114.
[24] 23 L.Q.R. 266 at p. 279.
[25] Quoted in (1926) J.S.P.T.L. p. 31.
[26] 57 L.J.News. 202 *et seq.* It was further advocated in the Presidential Address to the Provincial Meeting of the Law Society in 1928.
[27] J.Comp.Legis., Vol. 2 (N.S.), p. 180.
[28] See de Montmorency in *Contemporary Review*, Nov. 1923, p. 661, and Gutteridge in 42 L.Q.R. 436.

recognised the universities as approved law schools for the purpose so that these fulfilled a dual function; on the one hand they instructed for their own law degrees, on the other they taught for the Law Society's examinations and received grants from them. Both professional bodies therefore left the bulk of legal instruction to the universities which responded by an immense development of law teaching at Oxford, Cambridge and London, and, particularly after 1922, at the newer provincial universities and university colleges. Despite this however the professional bodies refused to recognise the universities' degrees as a qualification for practice.

The inevitable result of this tripartite system was a wasteful multiplication of teaching and examinations and a tendency for the universities' curricula to follow closely those of the professional examinations and to be vocational rather than scientific and cultural with little opportunity for advanced research. In 1908 a valuable attempt at some measure of co-ordination was made by the establishment of the Society of Public Teachers of Law open to law teachers whether of the universities, the Law Society's school or the Council of Legal Education. But this body has no executive powers and is far from including representatives of all those engaged in legal education. It does not, for example, include the Law Society's examiners, since by statute [29] the examinations must be conducted independently of any law school, or, more importantly, the professional law coaches—the description '*public* teachers' was deliberately designed to exclude them. These coaches have come to play an important part particularly in connection with the solicitors' examinations, which, being largely memory tests, have always lent themselves to cramming. Some of these coaches are highly efficient and the best known firm attracts more pupils than any single law school, but their efficiency, as they would be the first to admit, is directed to getting the candidate through his examinations and not to giving him a legal education. Dr. Jenks, and later principals of the Law Society's School of Law, aimed higher (indeed Jenks confessed that he did not alter his methods at all when changing from university to professional law school teaching [30]) but the only result was that too many of the students attended it as lightheartedly as possible to comply with the statute and then went on to the crammers for serious work.

The Atkin Committee.

That, then, was the position when in 1932 the Lord Chancellor, Lord Sankey, appointed a further committee under Lord Atkin 'to consider the organisation of legal education in England with a view to (a) closer co-ordination between the work done by the universities and the professional bodies and (b) further provision for advanced

[29] Solicitors Act, 1932, s. 26 (3).
[30] 23 L.Q.R. at p. 276.

research in legal studies'. At the risk of being thought disrespectful to the distinguished members of that committee I can only describe their Report[31] as a thoroughly disappointing document. The evidence which they collected was not printed but apparently it consisted only of written and oral testimony from the English universities and the two professional bodies and no attempt seems to have been made to compare the English system with that prevailing in any foreign country, British dominion or even other parts of the United Kingdom, or to investigate the finances of the Inns to see what proportion of their funds was being devoted to legal education. All these matters had been investigated in 1846 and 1854 and if any members of the committee were aware of the earlier Reports (and it must be confessed that there is nothing to suggest that they were) they must I think have felt slightly ashamed of the perfunctory nature of their inquiries. The result was that after only eight meetings, the committee in effect gave English legal education a clean bill of health. The only discordant note was struck by the late Professor Harold Laski, but even he was uncharacteristically restrained, contenting himself with a mild criticism of the absence of compulsory practical training for the Bar and of the failure of both branches to organise research. His colleagues too were critical on the latter point and recommended the establishment of an Institute of Advanced Legal Studies in London. Their only other major proposal was for the formation of a standing advisory committee containing representatives of the two professional bodies and the universities to consider from time to time suggestions for further co-ordination of examination and teaching requirements. If the project for a combined professional law school was considered at all it was not thought worth even a passing reference in the Report.

The subsequent history of the Atkin Committee's two proposals is best summarised in a written reply by the Attorney-General to a question in the House of Commons on May 15, 1947,[32] a reply which is perhaps the classic illustration of the complacency and apathy to which I have referred. As regards the proposed advisory committee, he said that its functions were already being satisfactorily performed by the Council of Legal Education and the Council of the Law Society which were 'in a position' to maintain liaison and co-ordination with the universities and 'available for consultation by Government Departments or official committees interested in legal education[33] and for advising generally on such matters.[34] In the circumstances no useful purpose would be served by setting up an advisory committee'. As regards the proposed institute the recommendations had been implemented by the

[31] Cmd. 4663 of 1934.
[32] Vol. 437, H.C.Debs., cols. 189–190 (written answers).
[33] Are there any?
[34] When did they last 'advise generally'?

appointment in 1938 of a further committee to consider its establishment. He continued, 'This Committee has not yet reported. It suspended proceedings in February, 1940, and has not yet resumed operations. Having regard to the urgent need for reconstructive activities in other directions and to the Government's legislative programme the time is inappropriate for the resumption of the Committee's operations or the setting up of an Institute of Advanced Legal Studies should such a course be recommended'.

In other words, of the committee's two suggestions, one was unnecessary and the other inexpedient!

Happily the project for an Institute was not to be killed by official discouragement and London University proceeded to establish it a year later. Having regard to the expressed view of the Government, one would have expected all ministers to remain severely aloof, but in fact the Institute was opened by the Lord Chancellor in person with expressions of the utmost cordiality.

So much for history; a history, I suggest, of which the legal profession in general and the Bar in particular have no great cause for pride despite the undoubted progress which has been made. I now propose to examine the present system a little more closely and to discuss whether it is satisfactory and if not how it might be improved. I shall do so under the following heads:—

General organisation
Subjects taught
Teaching methods
Examination methods
Selection and status of teachers; and
Continuing legal education.

II. General Organisation

As we have seen, there are three independent systems of legal education in this country.

Barristers' Training.

For call to the Bar it is necessary to join an Inn of Court after matriculating and to 'keep terms' by eating dinners normally during three years. During that time the student must pass the two parts of the Bar Examination, as preparation for which he can, if he wishes, attend the lectures and classes of the Council of Legal Education. He may also, if he wishes, spend a few months in a solicitor's office (most do not) and may become a pupil and read in the chambers of a practising barrister (which most do, although not until after they are called). The only essential requirement therefore is the ability to pass an examination. During the three years he cannot earn anything from legal practice and will have little opportunity of earning anything outside, particularly as he may not engage in 'trade', and his expenses will be heavy.

Even after call he is unlikely to make enough to keep himself (let alone a wife and family) for at least another five years.

Solicitors' Training.

Requirements for admission as a solicitor are much more stringent. Here, too, the student must have matriculated, or passed the Law Society's Preliminary Examination in lieu. He must then be articled (*i.e.*, apprenticed) to a solicitor normally for five years during which he must not engage in any employment except with the consent of the Master of the Rolls, which consent is rarely sought or given. Prior to admission to practice he must pass the Law Society's Intermediate and Final Examination and, unless he has previously taken a law degree, attend an approved Law School for at least a year commencing within fifteen months from the beginning of articles. He too will have to bear heavy expenses. These have admittedly been reduced recently by the abolition of certain stamp duties [35] but he will normally have to pay a premium to his principal possibly of as much as 500 guineas. After admission he is in a better position than the newly called barrister, but unless he has capital he will be forced to take a salaried post and is unlikely to earn more than about £400 per annum for a good many years.

University Education.

Finally, there are the universities which alone attempt to give a thorough scientific training in law. But, as already emphasised, a law degree is in no sense recognised as a professional qualification, and, moreover, anyone can become a barrister or solicitor without having read law (or anything else) at a university. The only effects of a law degree are that it exempts from the legal portion of the Solicitors' Intermediate and from the equivalent subjects in Part I of the Bar Examination [35a] and that it reduces the period of articles from five to three years. This latter reduction, however, applies to any university degree, to one in Arts or Science as well as to one in Law. Similarly, the Bar regulations reduce the number of dining nights that have to be attended in the case of any student who is a member of a university at the time. These concessions by the professional bodies do, however, at least make it clear that they recognise the advisability of a university training.

Criticisms of Present Organisation

In the light therefore of this summary and of the history of the last 100 years it would, I think, be fair to say that it has come to be recognised that a thorough training for legal practice requires :—

[35] In particular the £80 stamp on Articles.

[35a] But in the case of some subjects only if the candidate has attained second class honours in the university examination.

First, an extended course of theoretical training designed to give a background of general legal principles and techniques;

Secondly, a period of practical apprenticeship supplemented by institutional training; and

Thirdly, some examination test to ensure, in Lord Campbell's words, that 'those entrusted with defending life and property are decently well qualified for the duties which they may be called upon to discharge'.

But although this seems to be recognised, because some arrangements to this end have been provided and students are, at least, encouraged to avail themselves of them, can it be said that such arrangements are adequate? In my submission it cannot. Judged by this threefold test our present system seems to me to be seriously deficient in the following respects :—

1. *Barristers' Training.*

The requirements for the Bar, theoretically the more learned of the two branches, do not necessitate compliance with any of the three tests. There is no compulsory theoretical training, practical apprenticeship or institutional attendance; the student is merely 'recommended' to attend the Inns of Court School of Law and to read in Chambers. Only students resident in London have an opportunity of attending the school and as the teaching is by part-time visiting lecturers there is little opportunity for personal contact between them and their audience. There is, it is true, a compulsory examination, but although this has been tightened up somewhat in recent years it is still surprisingly easy, considerably more so, for example, than the London LL.B. or the Solicitors' Final, and although it is supposed to be a more practical examination than those of the universities it hardly makes good its pretensions except by placing slightly more emphasis on procedure. No one, I imagine, would seriously contend that the mere fact of passing the Bar Final is proof that one is decently well qualified for the duties which a barrister may be called upon to discharge.

These defects of the Bar requirements are generally recognised; they are, for example, stressed in Professor Laski's addendum to the Atkin Report and in Sir Alexander Carr-Saunders' and Mr. Wright's book on the Professions. On the other hand, Mr. Rupert Cross in a recent article on legal education [36] has suggested that the criticisms are exaggerated and made by laymen rather than lawyers. Even if it were true that complaints were made by the public rather than the profession, I am not sure that this would be a valid argument that the criticisms were unfounded; the defects of a dentist may be more apparent to his patients than to his professional colleagues and may nevertheless be painful realities. But in fact

[36] 'Some Controversial Points in the Teaching of Law' (1948) 21 Universities Review, p. 16.

it is just not true. Even if we have the temerity to dismiss the late Professor Laski and Sir Alexander Carr-Saunders, who is a barrister, as uninstructed laymen, equally trenchant attacks will be found in the works of Dr. R. M. Jackson,[37] Mr. Claud Mullins,[38] Mr. Heber Hart, K.C.,[39] Professor G. W. Keeton,[40] and the late Dr. A. E. W. Hazel, K.C.[41] (to name but a few). Nevertheless, I do agree with Mr. Cross that it is possible to exaggerate the inadequacy of Bar education; it looks worse than it generally is. In fact, most Bar students take a university degree (although often not in law) while keeping terms,[42] for this they can do without adding to the length of their training, and also attend the Inns of Court School. After call it is usual to spend a year reading in chambers; indeed, it may fairly be said that a barrister's training really begins after he is called, and is gained in chambers assisting more senior colleagues and in such work as solicitors may entrust to him directly. The apparent danger to the public is minimised by our divided profession and by the prohibition of direct contact between the barrister and the lay client whose interests are protected by the solicitor. But the effect of the system on the career of the barrister himself is little short of calamitous, for it means that he is likely to spend many years after call completing his education in haphazard and ill-remunerated employment in police courts, county courts, undefended divorces and on judgment summonses (these being all that solicitors are likely to send him). Even these scraps will be denied to the Chancery barrister whose initial struggle to learn his job and make a name for himself is likely to be even more difficult though less peripatetic. A more wasteful system can hardly be imagined and it is not surprising that although many are called few are chosen to stay the course. As Carr-Saunders and Wright point out,[43] 'No solicitor likes to employ a barrister whose sole recommendation is that he has been called. In all

[37] *The Machinery of Justice in England*, p. 199.
[38] *In Quest of Justice*, p. 333.
[39] *The Way to Justice*, Chap. 10.
[40] 58 L.Q.R. 247; 27 Can.B.R. 283.
[41] 47 L.Q.R. 502 at p. 506: 'The doors of the Inns of Court are too wide open and . . . some are admitted with inadequate credentials'.
[42] According to figures kindly supplied by the Under-Treasurers of the four Inns, of students called in 1949, 57 per cent. held degrees of English Universities. Unfortunately figures are not available showing what proportion of these degrees were wholly or partly in law, but it is estimated that it was at least 70 per cent. of the total graduates (Gray's Inn put it as high as 90 per cent.), and the proportion is certainly rising. The Law Society state that 36 per cent. of articled clerks who passed the Final in 1949 were graduates and that 73 per cent. of graduates had law degrees. The proportion of English graduates among those proposing to practise at the English Bar is probably somewhat higher than the figure of 57 per cent. given above because the total called to the Bar includes a large number of Dominion and Colonial students.
[43] *Op. cit.* p. 380. The defects of a purely practical training were cogently expressed by Dicey in his Inaugural Lecture in 1883 (*Can English Law be Taught at the Universities?*: Macmillan & Co., 1883).

probability no single factor contributes so much to the concentration of work at the Bar upon the small proportion of the qualified who alone have been able to exhibit their competence'. Whether the recent Legal Aid and Advice Act, 1949, will result in some alleviation of this position it is still too early to say, but it may be that it will at least cause the work to be more equally spread and assist the newly called barrister to earn his living during the early years.

2. *Solicitors' Training.*

The requirements for solicitors are certainly more satisfactory. Here there is at least an adequate period of practical training and some institutional training. There can be no doubt that a newly admitted solicitor is likely to be infinitely better qualified than a newly called barrister [44]—and this is as it should be for solicitors constitute the vast majority of the profession and they alone have direct contact with the lay public.

But even here there are grave defects, particularly as regards theoretical training. The regulations make some attempt to ensure a background of general legal theory by requiring the articled clerk who has no law degree to attend at a law school for the statutory year commencing within fifteen months from the beginning of his articles, and to pass the Intermediate Examination which may perhaps be regarded as a test of such a background.[45] If the statutory year is spent at a university law school the whole year will, in practice, be spent on a part-time course working for that examination. If the year is spent at the Law Society's school two full-time courses of six months each will be taken, one for the Intermediate but the other for the Final Examination at the end of articles. It is obvious that an adequate general background cannot be imparted in six months, nor in one year, especially when instruction is at odd times taken off for practical work in an office. The minimum period needed is three years (the length of a degree course) and it is doubtful whether any theoretical training, however long, can be combined with articles without serious detriment to both. Hence there seems to be fairly general agreement among teachers at law schools that this statutory year's attendance is of very doubtful value. Nor can the Solicitors' Intermediate, though a perfectly sensible examination so far as it goes, be regarded as an adequate test of a theoretical background. At best it roughly corresponds to the intermediate standards of a university degree.

[44] All the critics I have quoted are agreed on this.

[45] Solicitors Act, 1932, s. 14 (*b*) (ii), describes this as 'an examination of articled clerks in order to ascertain the progress made by them during articles in acquiring the knowledge necessary for rendering them fit and capable to act as solicitors', but the nature of the examination and the provisions for exemption under s. 30 and the Regulations seem to show that in fact it is now regarded as a test of a theoretical background.

So far as practical training is concerned, the length of this is prescribed and is fully adequate, but the quality of it is left to chance since no supervision is exercised over the training given. Everything therefore depends on whether the student has selected the right sort of principal. The Law Society go to some pains to ensure that students are suitable recruits to the profession (all are now interviewed personally) but assume that any solicitor who has held a practising certificate for five years is a fit mentor to not more than two articled clerks at a time and make no attempt to supervise what goes on during articles, merely requiring that at the end the principal shall certify that the articled clerk has attended diligently. Even if the principal is conscientious and does all he can, his practice is likely to specialise in certain branches rather than others so that the pupil will gain considerable experience of some things and none at all of others. And not all solicitors are conscientious; some, I think not many, regard their articled clerks as cheap labour to be employed on whatever is most profitable to the principal, rather than on what is most instructive. Moreover it by no means follows that the higher the premium paid the better the articles will be. On the contrary the size of the premium is generally in proportion to the size of the firm and it is in the large firm with high premiums that the articled clerk is most likely to be forgotten and left to his own devices and in the small one-man firm that he may receive the closest supervision.

The value of the practical experience gained therefore varies greatly but even at its best it cannot cover everything that the student ought to know before he is let out into the world as a fully-fledged solicitor. To fill the gaps in his experience and to ensure that he fully understands what he has experienced further institutional instruction is essential. At present however no such instruction is compulsory; provided a student has taken a degree or completed the statutory year he is not bound to obtain any further law school training. If, as is likely, he feels in need of some instruction to assist him to pass the Final Examination he will probably turn to one of the private firms of law coaches. The universities do not teach for the Final to any considerable extent although those in the provinces attract a certain number of articled clerks to their degree courses which cover much of the same ground. Only if the articled clerk is spending his statutory year at the Law Society's school will he undergo any institutional training at this stage. Teaching in the practical aspects of the training is therefore almost entirely in the hands of this school and the law coaches, and the primary purpose of both is not to fill in the gaps left by experience but to get their students through the examination. If this in fact were a real test of practical proficiency that would be the same thing but unhappily it is nothing of the sort. The candidate is required to take six papers each of twelve questions ranging over

almost every conceivable subject. Every question has to be answered and the candidate has only fifteen minutes in which to read, understand and write an answer to each. This is certainly a formidable test and no one can accuse the Law Society of making their qualifying examination an emasculated academic test like the Bar Final,[46] but it is certainly not a test of practical proficiency. In so far as this can be tested at all by written examination it can only be by searching problem questions aimed at assessing the candidates' understanding of principles and ability to apply them to new facts such as are likely to arise in practice. So far as possible the examiners try to set such questions but no candidate can be expected to deal with twelve of them in three hours and hence the papers have to be diluted with questions which merely test memory, and these, of course, are the crammer's joy. Not only therefore is the examination an unsatisfactory test of proficiency—for the solicitor who relies on a parrot-like memory is a menace—but it makes it impossible for the professional law school to function on the right lines. As Mr. Rupert Cross (a former lecturer at the School) says in his article,[47] 'If a student is to be taught how to answer an adequate number of the seventy-two questions which he has to tackle in the space of three days . . . he must be subjected to a process of cramming however much one may try to sweeten the pill by an occasional reference to the sociological and economic implications of a particular legal doctrine'. It is useless to argue that the school should not allow themselves to be swayed too much by the examinations; human nature being what it is a student whose whole career depends on his ability to answer these seventy-two questions in the immediate future is not going to pay much attention to anything else. It is not, of course, intended to suggest for one moment that lecturers at the school indulge in mere question-spotting; on the contrary they loyally attempt to cover the examination syllabus but this is so overweighted that they can do little more than dictate notes and are quite unable to hold discussion classes or to establish real personal contacts with their students. Moreover by attempting to cover the whole syllabus they place themselves at a disadvantage with the crammers so far as examination results are concerned. Only in connection with the Intermediate and with the separate Honours examination is the school in a stronger position than the crammers. This Honours examination certainly cannot be mastered by cramming and I have little doubt that it is a far more satisfactory test of practical ability, but unfortunately it is purely optional and only a small fraction of candidates sit for it. Moreover the scripts are only marked if the candidate has done sufficiently well in the

[46] The Bar Final also suffers from the defect of requiring too many questions to be answered (ten), but a reasonable choice is allowed, the field is much narrower, and the questions less practical.

[47] 21 Univs. Review, p. 16.

preceding Final examination. The result is that at present of every 100 candidates who sit for Honours only about 25 have their scripts marked and all of these normally succeed. We, therefore, have the absurd result of ploughing 75 per cent. of the candidates in one examination solely because of their showing in another!

3. *Lack of Co-Ordination.*

The third major defect is the lack of co-ordination between universities and the professional bodies. What part the universities ought properly to play in professional legal education, if indeed they should play any part at all, is obviously arguable and I mean to argue it later. For the moment it is sufficient to suggest that out present solution cannot be right. The universities, as we have seen, fulfil a dual role; in part they teach law and examine in it as a branch of knowledge for which they grant degrees, in addition most of them act as law schools for the professional bodies. The result is that they have tended to fall between two stools and to be in part schools of theoretical instruction and in part vocational training establishments. Quite rightly they try to subordinate the latter role to the former so that they do not in general organise special lectures and classes for articled clerks and bar students but insist upon their attending the normal degree courses. But this is only practicable if their degree syllabuses cover roughly the same ground as those of the professional examinations; hence these tend to control the nature and scope of the academic courses. If the professional bodies recognised that the university degree exempted from the equivalent subject in the professional examinations the system would at least have something to commend it, but they only do so to a very limited extent. A candidate who has judiciously selected his subjects in, for example, the London LL.B., can cover virtually the whole of the Bar Final, some part of the Solicitors' Final and the whole of the Solicitors' Honours but will not obtain exemption from any of them. The result is that a student who takes a university law degree spends a considerable amount of his time duplicating his examination tests. As Dr. Jackson says [48] 'The universities have partly followed the professional bodies and partly reacted from them. If the universities say "The professional bodies are so severely practical that to get a balance we must continue to be theoretical", the professional bodies say "The universities are so woolly and wide of the mark that we must insist on something useful". Between the two the law student has fared none too well, particularly in the matter of examinations . . .'.

[48] *Op. cit.* p. 197.

4. *Expense.*

The fourth and last major defect, expense, will have been apparent from what has gone before and I do not think that I need add much to it. The major hardship on this score is, I think, the length of time before the lawyer can hope to earn a living wage. The actual out-of-pocket expenses, heavy as these are, are less serious, particularly in the case of the Bar and the universities since scholarships and prizes are now generally available in deserving cases. They are, however, still a serious burden in the case of solicitors since the Law Society is not well-endowed with Scholarship Funds, although the recent Stallard Bequest has enabled them to help in some cases. The abolition by the present Government of the prohibitive stamp duties on Articles and admission certificates has also helped but the major hardship of premiums on articles still remains. In my opinion, and I am not alone in this view, the Law Society are at fault in not having given a lead to the profession by setting their face against the anachronistic [49] practice of premiums. If the articled clerk has had no previous legal training it may be that during the first year he is more trouble than he is worth (unless as is sometimes the case, he is used to replace the fast disappearing office boy) but viewed over the whole period of articles there is little doubt that he is an asset rather than a liability. But until the practice is prohibited or discouraged solicitors will naturally go on demanding premiums and the profession will continue to be recruited mainly from the relatively well-to-do. The fact is, of course, that neither the Law Society nor the profession as a whole have yet made up their minds that they do not want it that way. They still value their exclusiveness and the rules of both branches seem deliberately designed to preserve it by imposing financial barriers in the form of premiums, pupilage fees, and especially, by prolonging the period of unpaid apprenticeship. Keeping terms fulfils no other purpose and it is difficult to believe that five years' articles are essential if the authorities are willing to reduce this to three years in the case of Arts or Science graduates. The small salaries paid to newly admitted solicitors and the inadequate earnings of newly called barristers serve the same end.[50] Such practices are relics of the days when wealth and education went hand in hand, but now that education is no longer the prerogative of the rich, and we are all, whatever our politics, wedded to a policy of equality of opportunity, they seem anachronisms. The legal profession should

[49] That premiums are coming to be generally regarded as anachronisms is suggested by the Wages Council Act, 1945, s. 14, and the Agricultural Wages Act, 1948, s. 6. It also appears that premiums are becoming less common in other professions; for example, if chartered accountants demand a premium at all at least half of it is normally returned in lieu of wages.

[50] In contrast the best students leaving one of the better American law schools may expect immediately to earn about $4,000 p.a. (although the worst may fare even worse than in England).

remain exclusive but the key to admission should be ability not money.

5. Pre-legal Education.

There is one further major criticism which is sometimes put forward but to which I have not referred; the alleged inadequacy of our standard of pre-legal education. At present the matriculation standard is adopted. Some change will be inevitable when the new General Certificate of Education is introduced but the universities have agreed to accept this as their general test of admission provided that two subjects are taken at the higher level and it may be assumed that the professional bodies will come into line. Some critics, rightly stressing the importance to a lawyer of a wide cultural background, have suggested that this is inadequate. Thus in 1931 Dr. A. E. W. Hazel [51] suggested that the Bar should insist on a higher standard of pre-legal training and advocated a university degree in some subject other than law to be followed by a university degree in law. To my mind, however, these suggestions are Utopian. Expense and length of training are already excessive and no scheme for reform can be regarded as realistic unless it does not increase but, if possible, diminishes these. Having regard to the present period of compulsory military service, if Dr. Hazel's suggestions were carried out it would involve something over ten years between leaving school and commencing practice and there are few today who can afford that. I can see no prospect of teaching a man all the law and practice that he needs in less than five years, and if this is so it is impracticable to insist upon the potential lawyer remaining longer at school or taking an Arts or Science degree before commencing his legal studies. It is true that in most of the American law schools law is a post-graduate subject but this is a misleading analogy since a first degree in an American university is very different from ours and corresponds much more closely to our Higher School Certificate. In fact American critics have also tried to raise the standard of pre-legal education by requiring a longer period of study in certain other disciplines, but these experiments do not appear to have been conspicuously successful, doubtless for similar economic reasons.[52] If, therefore, a further broadening of outlook is essential, this must take place as an integral part of the legal training and not as a preliminary to it.

I therefore conclude that our present system is subject to four major defects, all of which really turn on the failure to provide proper co-ordination first, between the universities and the professional

[51] 17 L.Q.R. 508. See also Binchy, 38 *Studies*, p. 251 (n. 60a, *infra*).
[52] Vanderbilt, *A Report on Pre-Legal Education* ('Studying Law', p. 627, Washington Sq. Pub. Co., N.Y., 1945), 1 J.L.E. 443, and 28 Can.B.R. 129.

bodies and secondly, between institutional training and practical apprenticeship. This is a problem which has had to be faced in every country with a legal profession and although it is dangerous to suggest to English lawyers that foreign experience has anything to teach us, it might at least be of interest to indicate very briefly the solutions adopted elsewhere.

Comparative Survey.

On the Continent [53] the regulations generally require a university degree (First State Examination) followed by some sort of apprenticeship in whatever branch of practice the student proposes to enter. This apprenticeship is normally supplemented by further institutional training though the extent and nature of this varies. It appears to have been most advanced in pre-war Austria where there were evening colleges staffed by outstanding practitioners.[54] At the end of the apprenticeship a final qualifying examination (Second State Examination) has to be passed, this being a very severe test and, as will be suggested later, a far more satisfactory test of practical proficiency than any that we have devised.

It is perhaps of more significance that this increased reliance on the universities also applies to most other common law jurisdictions. In America [55] the regulations vary considerably from State to State and most of them still do not insist on law school training as the only means of entry. In practice, however, the vast majority of entrants qualify through training at university law schools. Although an additional Bar examination has to be taken this is on very similar lines to those of the universities, for a close relationship is preserved between the Bar examiners and the law schools through a permanent association known as the National Conference of Bar Examiners. In general, therefore, institutional training has superseded practical apprenticeship and the law schools largely control entry. The various provinces of Canada [56] seem to be tending in the same direction except that Ontario [57] refuses to accord any recognition whatsoever to university degrees. Practical apprenticeship for three years is there compulsory supplemented by institutional training during the whole of that time at Osgoode Hall, the professional law school. In the States of Australia all law teaching is undertaken by the universities, whose degrees

[53] Many accounts are available in the English language. Perhaps the most complete is Schweinberg, *Law Training in Continental Europe*. See also Friedmann, 'Some Observations of Legal Education in Australia, England and Germany', *Univ. of W. Aust. Annual L. R.*, Vol. 1, p. 93; 2 J.L.E. 21 (Turkey), and *ib.* 71 (France).

[54] Something comparable was introduced in France in 1941 (see 2 J.L.E. at p. 75 *et seq.*).

[55] See especially Brown, *Lawyers and the Promotion of Justice*, and *Rules for Admission to the Bar* (1949, West Publishing Co.).

[56] 13 Can.B.R. 317–347; 25 *ib.* 943; (1932) J.S.P.T.L. 32.

[57] See *The Solicitor*, March and May 1949.

(though not a compulsory qualification) exempt wholly or almost completely from the professional examinations. Practical apprenticeship is also compulsory, except in the case of the separate Bar in New South Wales and Queensland. New Zealand [58] also insists on practical apprenticeship but the university is the only teaching body and its degree is in effect also the professional qualifying examination. Similarly in South Africa all teaching is undertaken by the universities and the LL.B. is the qualifying examination for practice at the Bar (though solicitors have their own examinations).[59]

Greater reliance on the universities also prevails in the other parts of the United Kingdom. In Scotland [60] the professional organisations provide no teaching and university degrees are accepted in lieu of the professional examinations (except that, for some reason, Advocates have also to write a thesis in Latin on a title of the Pandects and must take Forensic Medicine as part of their degree course). In Northern Ireland, Bar students have to take a three-year course at Queen's University, but have to pass the examinations of the Council of Legal Education as well.

It will, therefore, be observed that in all these countries institutional training plays a far larger part than in England and that, except in Ontario, this is mainly given by the universities. The explanation of the English divergence is of course that the Inns of Court originally played the role supported elsewhere by the universities. Except in Ontario the English practice has not been followed in other common law countries and even in Ontario institutional training is compulsory for three years. Only in parts of the Continent is a clear distinction drawn between theoretical and practical instruction; elsewhere the universities (or, as in Ontario, the professional school) have to undertake both. Except in America practical apprenticeship of some sort is generally essential but not for so long a period as in the case of an English solicitor.

Suggested Re-Organisation.

I now turn to my suggested re-organisation designed to eradicate the present defects as I see them. I will first outline it as a whole and then attempt to fill in the details and to give my supporting arguments :—

1. Every barrister or solicitor should first be required to take a university degree in law.

2. Thereafter there should be a practical apprenticeship of two years. A solicitor should spend the whole two years in a solicitor's office; a barrister should spend the first year in a solicitor's office and the second in a barrister's chambers.

[58] See 1 J.L.E. p. 563.
[59] (1934) J.S.P.T.L. 32.
[60] See A. D. Gibb in 55 Jur.Rev. p. 152.

3. During the last six months of apprenticeship attendance should be compulsory at evening classes at a professional law school.

4. Finally the entrant should be required to pass a professional qualifying examination.

1. *University degree course.*

As regards the first step, I have already suggested that a general background of theory is an essential preliminary to a thorough legal training. That this is so seems to be implied by the regulations and examination requirements of both professional bodies, but except for the solicitors' statutory year they leave the student to decide whether and how he shall acquire it. It is generally agreed that he will only acquire it properly by taking a university law degree and both professional organisations, particularly the Law Society, seem to be feeling their way towards making this compulsory. The suggestion that they should do so has, however, aroused considerable opposition from the academic side. Those who oppose argue that the roles of the universities and professional bodies are different and that the universities should not take part in vocational training but teach law both to potential lawyers and others as a branch of knowledge like any other social sciences. There are many answers to this. In the first place, whether we like it or not, we are already playing a part in professional education and I do not imagine that it would be seriously suggested in England at the present day that all the links between the universities and the profession should be severed and that, as in Ontario, the professional organisations should provide all their own training and disregard completely the universities' degrees. Such a solution would be to reverse the history of the last 100 years, would hardly suit either branch and would be calamitous to the student. Secondly, the mere fact that a particular branch of knowledge is of especial interest to one profession is no reason why it should not be taught at a university [60a] or why the profession, if it thinks fit, should not insist on its recruits studying it at a university. All that is essential is that the profession should not seek to dictate to the university the method and scope of its teaching. The question, therefore, is whether the study of law by means

[60a] In all the recent discussions on the role of a university no one has suggested that the teaching of law should be completely excluded. Prof. Binchy, of Dublin, has approached closest to this conclusion and in a racy attack on university law schools concludes that only Roman Law, Jurisprudence and Constitutional Law are suitable for university instruction (xxxviii *Studies* (Dublin, 1949), p. 251). In his view the principal study of potential lawyers should be Classics or Philosophy. I wholeheartedly agree with his view that the university law schools have become too vocational but feel that he goes much too far in the opposite direction. I leave an Oxonian to reply to his strictures on their '*opera bouffe* of the Honours School of Jurisprudence'. Mr. Justice Gavan Duffy, in his comments on Prof. Binchy's article (*ibid.* p. 268) suggests a scheme of re-organised professional education very similar to that contended for here.

appropriate to a university is the best basis for subsequent professional training.

This question can only be answered if we first make up our minds how law should be taught at a university. This again is a large and controversial topic but I am content respectfully to adopt the description of the universities' role recently suggested by Lord Justice Denning, in an address to the last meeting of the Society of Public Teachers of Law.[60b] He said, in effect, that the task of the university was threefold; first to show how legal rules had developed, the reasons underlying them and the connection between legal and social history; secondly, to extract the principles underlying existing legal rules, and thirdly, to point the right road for future development. Whether in fact the universities at present succeed in fulfilling the high purpose pointed out to them by this eminent practitioner is a matter which will be discussed later, but at any rate I think that most academic lawyers would accept it as an admirable description of the role which they ought to play. One of the most distinguished of them, Professor E. C. S. Wade, was expressing the same idea when he said, in his inaugural lecture,[61] that law should be taught in the universities 'not as an exercise in professional technique but in relation to its place in the world in which we live'. In my submission it is precisely this type of teaching that is needed as a preliminary to professional study. As Professor Sidney Post Simpson has said when considering this very problem [62]: 'competence in the practical pursuits of the law is promoted far more by an understanding of the law's underlying purposes and theories than by acquaintance with tricks of the trade'. And whether or not the universities succeed in teaching law in this way they certainly come nearer to it than the professional bodies could hope to do. If the latter seriously attempted to fulfil this task, theory would inevitably succumb to practice and understanding of principles and purposes to tricks of the trade. If anyone doubts this, I suggest that he studies the recent dispute at Osgoode Hall [63] which led to the resignation of Dean Wright and three of his colleagues, or that he considers the experience of the Australian universities which have had to withstand constant pressure from the practitioners to be more vocational and less academic.[64] As I see it such pressure is inevitable unless there is a clear separation between preliminary

[60b] (1949) 1 J.S.P.T.L. (N.S.) 258.

[61] 9 Cam.L.J. (1947), p. 286.

[62] 49 Harv.L.R. 1068. See also Wright, 28 Can.B.R. 140.

[63] The progress of this intriguing disagreement can be followed in the pages of the Can.B.R. It has also spilled over into the English legal periodicals; see *The Solicitor* for March and May, 1949.

[64] That they have been able to withstand it as well as they have seems to be due, as in U.S.A., to the relatively high status of university teachers. Even so the university courses both there and in America seem in many respects to be excessively 'vocational' by our standards. That this danger is fully realised in Australia, as well as in America, is shown by Prof. Shatwell's recent article 'Some Problems of Post-War Education' in 22 Aust.L.J. p. 17.

theoretical training, which should be left to the universities, and subsequent practical training and qualifications for entry, both of which should be controlled by practitioners.[65] Provided this distinction is made and recognised by both sides there is no reason why there should be any undue pressure by one on the other.

The argument which is here put forward is very similar to that recently adopted by a special committee which has recently considered the analogous topic of education for commerce. In their report [66] they draw a distinction between vocational education (the study of the underlying principles and background) and vocational training (training in the skills and techniques for the purpose of making competent practitioners).[67] While fully alive to the force of the warning by Professors Sir Arnold Plant and J. G. Smith [68] that this distinction must not be pressed too far it seems to me to be a valid one applicable equally to legal education and training. The committee also concluded that vocational education should precede practical experience [69] and was a proper subject for university instruction,[70] whereas vocational training should be after entry into employment [69] and should not be undertaken by the universities.[70] These conclusions are precisely those contended for here.

Further objections to making a university degree compulsory have, however, recently been put forward by Mr. Rupert Cross in the article from which I have already quoted extensively. He suggests first that it would involve introducing complete uniformity in university syllabuses since otherwise the professional bodies would not know where their instruction and examinations should start. This difficulty is of course avoided in Continental systems where both university and professional syllabuses are controlled by the State. But I think that this objection is in fact based upon a misunderstanding. It is not suggested (at any rate by me) that the whole field of law should be partitioned between the universities and the professional bodies and fenced off in self-contained parcels. On the contrary the professional bodies could, if they wished, teach

[65] For a different view, see 'Culture and Anarchy in Legal Education' by Prof. J. D. I. Hughes (1932) J.S.P.T.L. p. 1, who pleads for 'a true vocational idealism in legal training which might command the loyalty of both faculties and professions'. For reasons stated, I regard this 'idealism' as unattainable and far from ideal.

[66] H.M.S.O. 1949.

[67] At p. 20.

[68] At p. 71.

[69] At p. 21. The Report of a German Commission on University Reform in Germany (H.M.S.O. 1949) takes a different view on this point; see p. 9 ('Students should receive practical experience in their future profession either before or during study. Practical experience alone can give the student a full understanding of his theoretical material. This is true especially of all professions which have to do with human beings, such as the . . . law'). As pointed out above, Continental practice in general has not drawn a distinction between professional training and academic study for the law.

[70] At p. 41. The same point has been made by most of the speakers in the B.B.C. series on 'The Idea of a University' (*The Listener*, March 9, 1950, and subsequent numbers).

and examine in every branch of the law. But they would do so in a different way; they would train and test practical aptitude and assume a general theoretical background. However, it should be possible for them to narrow the scope of the professional syllabuses by assuming an adequate knowledge of certain branches of the law. There is already a substantial degree of uniformity among the various universities and, even if this were not increased, at the very least a knowledge of Constitutional Law, Criminal Law, Contract and Tort could be assumed. The professional bodies would of course have to decide on what they would recognise as a 'law degree' and the Cambridge tripos system, under which the student may read law for one part only of his degree course, might cause complications. This, however, is only a matter of definition. The point which must be made is that the introduction of a law degree as part of the professional qualification does not necessarily involve uniformity although ideally this should be attainable if all universities have the same aims.

This brings me to Mr. Cross' second objection, namely, that it would discourage potential lawyers from reading subjects other than law at the university. I admit this, but am prepared to accept it. I consider that to an intending lawyer a law degree (particularly if its scope were widened as suggested below) is so much more valuable than any other that if it is a question of choosing one or the other he should choose law. To an ever increasing extent this is the choice that is being made voluntarily.

Finally, Mr. Cross considers it alarming to refuse to admit a man to practise as a solicitor merely because he is unable to master essentially academic subjects like Roman law and jurisprudence, and he instances the 'ten-year man' who has been an unadmitted clerk. I am afraid that I am not at all alarmed. It is precisely the ten-year man who most needs the cultural benefits of academic subjects and if he is not capable of mastering them then he should remain an unadmitted clerk. If he cannot afford the time to take a day course then by all means let him take it in the evening but surely one should not oppose the compulsory degree merely because some people may find it difficult? The object of the reform is not to make entry intellectually easier—quite the contrary.

Happily I do not think that there is very much difference between Mr. Cross and myself. He admits that the present system is thoroughly unsatisfactory, that a lawyer who has taken a law degree is likely to be a better lawyer, that the function of the university is to produce 'graduates with legal minds and a sociological outlook' rather than with a knowledge of every detail of the law, and that instruction and examination in the latter is the task of professional legal training. It is only on the question of a compulsory degree that we differ and I hope that even there he is not

beyond conversion for he admits that he is unable to suggest any satisfactory alternative.

It may be further objected that a compulsory degree course would necessarily add to the entrant's expenses and therefore defeat one of my own objects. In fact, however, the great majority of university students are now in receipt of scholarships and grants and the time seems to be fast approaching when no one need be debarred by the expense from the benefit of a university career.[71] In the meantime it may be necessary to allow degrees to be taken externally but this should certainly only be a short-term solution.[72] Evening courses, on the other hand, will probably always be necessary to meet the needs of the ' ten-year man ' and the like.[72a]

2. *Apprenticeship.*

The second suggested step is compulsory practical apprenticeship for two years.

Two main points arise here. Is any compulsory apprenticeship necessary, and if so, how long should it be? In America the tendency has been away from apprenticeship leaving pre-admission training entirely in the hands of the law schools, and the effect has been to force them to cover far more subjects than we in England would regard as practicable or desirable. Even so not all American opinion is satisfied with this isolation from practice and various attempts have been made to infiltrate clinical experience into law school training, while some, like Judge Jerome Frank,[73] want to go further and to turn the law school into a sort of sublimated law office.

Be that as it may, we in England are still wedded to apprenticeship and I think rightly. At present, however, it is not compulsory in the case of the Bar though almost universally adopted by all who intend to become practitioners. The only argument against making it compulsory is that it would prevent call to the Bar by those who wish to study law as part of the education of a gentleman but with no intention of practising. This argument is, of course, a relic of the days when the Inns were the legal university, but this they have long since ceased to be and have repulsed the constant invitations to become so again. They are now purely professional

[71] Cf. the Report of the Working Party on University Awards (1948, H.M.S.O.).

[72] As the Report of the Committee on Education for Commerce says (at p. 41): ' The greatest benefit can be obtained from a university degree course only when the university exercises complete control of the teaching, and, though residence at a university may be the ideal, full-time attendance for instruction under its ægis should be the minimum requirement '.

[72a] Having regard to the figures quoted *supra* n. 42, it is believed that a compulsory degree would not impose an insupportable load on the universities. The majority of barristers already take a law degree, and the vast majority of those solicitors who do not, already attend a university for the statutory year. In normal conditions, therefore, the universities should not have to cope with greater numbers than they have handled in the immediate post-war years.

[73] 56 Y.L.J. 1303.

bodies and call to the Bar is a purely professional qualification. It is utterly ridiculous that this qualification should be obtainable by book-work alone merely to make things easy for those who do not wish to practise the profession. At present if a university student of any faculty asks me what is the simplest way of adding a high-sounding professional qualification to his academic one, I reply, 'If you have a little Latin read for the Bar. In three years you will be able to describe yourself as "Barrister-at-Law" and although you will know precious little law and will be quite unfitted to practise it, it should assist you to obtain a good job in industry or commerce'. I cannot think that the Bar would wish to have their qualification prostituted in this way, but they have only themselves to blame. It seems to me to be crystal clear that the proper place for non-professional legal study is a university.

If then apprenticeship should be compulsory, how long should it be? Opinions will differ but my experience convinces me that two years is just sufficient provided that it is full-time and that it is preceded by three years training in law at a university. An additional year would probably be ideal but would involve an increase in the total period of training which, for reasons already stated, appears to be impracticable under present conditions. I hope that premiums and pupilage fees would be abolished and indeed that the solicitor's articled clerk would be paid a small salary; already it is becoming increasingly the practice to accept law graduates without a premium in recognition of the fact that their services are of value. It is suggested that potential barristers should be compelled to spend one of their two years in a solicitor's office. Whether the Bar Council and the Inns could be reconciled to this I do not know but I am sure that they would be well advised to accept it. The isolation of barristers' chambers from the harsh daily realities of practice in a solicitor's office is an undoubted handicap and barristers who have spent a few months with a solicitor testify to its subsequent value.

Supervision over the apprenticeship should be exercised by the professional bodies. The Law Society, instead of merely interviewing the would-be apprentice, should also interview the principal and question him about the course of training which he proposes to give. They should also require quarterly reports on the student's progress. The Bar Council, which is at last establishing an adequate secretariat, should exercise similar supervision over pupilage. The ultimate ideal would probably be to have London and provincial boards of inspectors of both branches who would exercise close supervision over articled service and pupilage.

3. *Professional Law School.*

The third step is attendance at a professional law school. The need for institutional training during apprenticeship has

already been argued and it has been stressed that the method of teaching should be entirely different from that previously given at the universities. At present both professional bodies have law schools in London where instruction is given for their examinations. The lecturers of the Inns of Court School are partly practitioners and partly university teachers but, owing to the nature of the Bar examinations, the whole of the teaching is largely academic in character. The Law Society's School has recently been remodelled and is now a rather more elaborate organisation where full-time courses of six months' duration are given for the Intermediate and Final Examinations by full-time teachers mainly of the university type who may or may not have had practical experience in the past but who are no longer in practice. Neither school is of the type which I should like to see; namely an evening school (such as existed in pre-war Austria) where instruction takes place during the apprenticeship and is related to it and is given by experienced practitioners.

No doubt it would be possible to provide this after a fashion if each branch retained its separate school, but it can only be done properly if at long last they combine their resources to establish one united law school.[74] I have gone to some pains to show that there is nothing either original or revolutionary in this suggestion; all I am advocating is a return to the scheme sought for so long by Lords Westbury, Selborne and Finlay. In recent years there have been signs of a rapprochement between the Bar Council and the Law Society, and a Standing Joint Committee of the two has been established and has worked harmoniously. Is it too much to hope that after over a century of struggle the Bar will at last drop their intransigent attitude and will agree to a united front to tackle the problem of legal education? No doubt some of the same old arguments will be raised against it and in particular the bogy of fusion. But these arguments were exploded by Lord Selborne sixty years ago and time has merely strengthened his case. Today barristers and solicitors come from the same families, go to the same schools and universities and move in the same circles. How can it be suggested that the demand for fusion will be reinforced merely because they also spend a few months together at a professional law school? On the other hand, nothing is more likely to strengthen this demand than continued opposition to desirable reforms on the ground that these are incompatible with the preservation of the present division.

It may be suggested that one school in London would not suffice and that further schools would also be necessary in the provinces. At present, however, the Bar make do with one school only, and the same is essentially true of solicitors since little instruction for

[74] As emphasised below, this does not imply that the curriculum for both branches should be the same.

the Final Examination is given by the provincial universities, and most articled clerks come to the capital for the last few months of articles either to work in the offices of their principals' London agents or to attend the Law Society's School or a crammer. Hence the position of the provincial student would be no worse if only a London school was established. Nevertheless, there seems to be little doubt that the provincial Bar student and articled clerk is ill-served at the moment and that there is no real justification for forcing them to incur the additional expense of a prolonged visit to the metropolis. In time, therefore, teaching should be decentralised by establishing provincial schools under the auspices of the local law society and Bar. It is, however, important that they should not be organised by the local university as this would be to confuse the essential distinction between practical and academic instruction. These schools should also house adequate law libraries which at present the provincial lawyer and student so conspicuously lack.

The next question is how and where premises could be found to house the main professional school in London. Well, both professional bodies have premises at the moment and there is no reason why these should not be retained and used—the school would be no more outspread than the Faculty of Laws of London University. But if, as a long-term plan, they could be combined under one roof, preferably in Lincoln's Inn, this would undoubtedly make for easier administration and financial economies.

The final problem is the provision of the necessary finance. Initially there is no reason why the united school should be more expensive than the sum of the present separate schools. If, however, capital expenditure is required for expansion, the New and Clifford's Inn Funds are still worth over £120,000 and Finlay's original scheme provided for their application to just such a purpose. Irrespective of the proposals which I have put forward I cannot forbear from protesting against what I regard as the grossly inequitable division of the income of the funds between the Inns and the Law Society under the provisional scheme. This money was saved for legal education solely because of the public-spirited action of the Law Society. The Society have to see to the education of a vastly greater number of students and have made determined efforts to do so, establishing an elaborate organisation of their own in London and helping to maintain thirteen schools in the provinces. The Inns, on the other hand, have consistently opposed every advance in legal education and have merely established one school for part-time optional instruction. They are reputed to be immensely rich (how rich nobody knows since no one has seen their accounts since 1854) and part at least of their funds are held on charitable trusts for legal education. The Law Society are poor—so poor that they have recently had to increase

the annual subscription to make ends meet. Yet the income of the funds which the Law Society rescued is shared equally with the Bar. In these circumstances I submit that the maxim 'Equity is equality' has no application and that another equitable maxim might be more appropriate. So far as I know, the Law Society have never protested against this division; no doubt they refrained from doing so at the time in the hope that the Bar, if handled tactfully, might come round to accepting Finlay's original proposals. But once it was apparent that this hope was vain I think that they should have protested vehemently and gone on protesting. In any case the present allocation was never meant to be other than provisional and temporary, and after half-a-century it is high time that a permanent and more just scheme was prepared. As suggested, the ideal purpose would be that originally envisaged, a professional law school for both branches, a project which I am sure that the Law Society would still support. If the Bar would not, then in my submission the New and Clifford's Inn Funds should be allocated solely to the Law Society or shared by them with the law schools of the universities, to the exclusion of the Inns of Court.

4. *Qualifying Examination.*

The final step is a qualifying examination, the nature of which I shall consider in greater detail later. All that needs to be stressed here is that this examination should be controlled by the professional bodies preferably acting through the professional law school. I certainly would not suggest that we should adopt the practice of Australia, New Zealand, S. Africa and Scotland of allowing a university degree to be a qualification for admission to practice.[75] If it were the universities would inevitably and quite properly be subjected to pressure from practitioners to make their courses more vocational.

It is to be hoped, however, that the two branches would agree to a common examination, the running of which would be delegated to their united law school. The present rule under the Solicitors Acts,[76] that examiners must not be teachers at the law school, does not seem to be supported in any quarter and was the subject of one of the few criticisms made by the Atkin Committee. The fact that the examination should be common to both branches does not of course mean that each should take exactly the same papers, or attend exactly the same classes at the law school. As I see it the majority of the subjects would be taken by both, but some would be peculiar to the Bar and others peculiar to solicitors. This however is a matter considered more fully under the next heading.

[75] A similar system prevails in some of the States of U.S.A., but this 'diploma privilege' is strenuously opposed by the American Bar Association and is on the wane.

[76] Solicitors Act, 1932, s. 26 (3).

III. Subjects to be Taught

The Functions of a Lawyer.

So much for the general organisation of pre-admission training. I now turn to the second question: what subjects should be included in the curricula of the universities and the professional law school? This question can only be satisfactorily answered if we first make up our minds what a lawyer does and what knowledge and skills he needs in order to do them. In America it has been recognised that at the present day lawyers do many things besides engaging in private practice in a law office. In England on the other hand our syllabuses still seem to be largely based on the assumption that the lawyers we train will devote their lives exclusively to private practice as barristers or solicitors and that all they need is a knowledge of legal rules and skill in applying them to the facts of new cases. We concede, perhaps, the need for skill in the interpretation of statutes and documents and attempt, somewhat half-heartedly, to teach that. We also admit that skill in drafting and advocacy will be required but we avoid the necessity of trying to teach it, by arguing that it can only be acquired by practice and not by precept.

Our basic assumption is quite obviously false. Only a fraction of the lawyers that we train will go into private practice; the rest (an increasing proportion) will become central or local government servants, advisers to public corporations and companies, business executives, politicians, teachers, magistrates or magistrates' clerks. Clearly these need something very different from a narrow training in legal technique and there is fairly general recognition, in theory, that the universities should attempt something wider and in particular that they should emphasise the sociological purposes of law and relate it to the other social sciences. This fact is recognised in the statements of the objects of university legal education by Lord Justice Denning and Professor Wade which I have already quoted; and such quotations could be multiplied—the same view, has, for example, been expressed by Lord Sankey [77] and Lord

[77] 'The Courts are becoming more and more concerned with great social experiments. Law joins hands as never before with problems in economics, problems in political science, problems in the technique of administration. It is important that the curricula of our law schools should send out lawyers trained to appreciate the meaning of these relationships. They must shape the mind to a critical understanding of the foundations of jurisprudence. Unless the training we give supplies these perspectives there is grave danger that the lawyer will not prove adequate to the big problems he has to help in solving. We are now on the threshold of an epoch of profound legal transformation. Our educational methods have to breed a race of lawyers able to utilise the spirit of law reform for the highest uses. They have to teach the importance at once of stability and change. To do so they must know not only how to grasp the philosophic foundations of those decisions. We must also turn out lawyers with a courage to criticise what is accepted, to construct what is necessary for new situations, new developments, and new duties both at home and abroad.' Quoted in (1933) J.S.P.T.L. at p. 23. See also Lord Atkin in (1932) J.S.P.T.L. at p. 32 *et seq.*, and Dean Wright in 28 Can.B.R. 140 *et seq.*

Wright.[78] It is also to some extent translated into practice in the increasing emphasis on public rather than private law, and in the changing scope of courses on Jurisprudence. Individual teachers have also attempted to introduce general sociological conceptions into their teaching; this has been done at London University by my distinguished predecessor Lord Chorley, by Professor Robson and by Dr. Kahn-Freund in their teaching of commercial, administrative and industrial law. But, except perhaps at Queen's University, Belfast, there seems to be nowhere on this side of the Atlantic where this approach permeates the whole of the training. Nor must it be assumed that even lip-service would be universally paid to the need for such an approach; there are still many who agree with the late Lord Justice Scrutton that the less sociological knowledge we introduce into these matters the better. A distinguished member of this university recently dismissed all such notions as 'sociological nonsense' and much the same opinion was apparently held by the late Dr. Stallybrass.[79]

The professional bodies afford even less recognition of this need. They accept constitutional law as essential and the Law Society give candidates an option of taking magisterial or local government law instead of divorce and conflict of laws. But, apart from this, the curriculum of the Council of Legal Education might not unfairly be described as private law with the difficult bits left out and a little court procedure put in, and that of the Law Society as the technical details of as much private law as possible. No doubt it is true that the primary concern of both these bodies is to train lawyers for private practice but even these now need a much wider training than in narrow private law techniques. In the present-day planned and regulated community no lawyer can hope to advise his client adequately if his knowledge is restricted to the old private law subjects.[80] Moreover, it is no longer true, if it ever was, that all a lawyer has to do is to advise his client on what his legal position is and to translate into legal phraseology policy decisions already reached by the client. He is also expected to advise on what the

[78] 'Law in its own way covers the whole range of human activity; there is no side of life which it does not touch. And the student of law must know the course of national history under which it developed; he must appreciate the affinity of his ideas with the social, moral, and economic ideas alongside of which it developed': 54 L.Q.R. 185 at p. 199. See also the Report on University Reform in Germany, at p. 5: 'The universities would be more alive to their lack of co-ordination with contemporary society if professors and students were in closer touch with practical life and if they had studied the nature of social life as part of their university discipline'.

[79] (1948) 1 J.S.P.T.L.(N.S.) 157 at p. 164.

[80] Cf. Jackson, *op. cit.*: 'A narrow training in nothing but the technique of legal work is unlikely to produce the right type of men. . . . Lawyers must see their work in its social setting; they must learn to test their rules and practice by examining the functions that they are fulfilling' (p. 195). It has been suggested to me that a common law barrister can manage well enough on the present narrow training, but this certainly does not apply to the Chancery Bar nor to those who practise in commercial cases or in town planning.

policy should be. This is fairly obvious in the case of the company and commercial lawyer but applies also to the family solicitor advising his client on how he should dispose of his property by settlement or will. It is because he is rarely qualified to give such policy advice that the lawyer is losing more and more work to the accountant and banker.

In other words the barrister and solicitor has, in the broadest sense, to make law as well as to advise on what it is at present; to be a legislator as well as an adjudicator.[81] This law-making function becomes more direct and obvious when the lawyer is elevated to the Bench. Surely the Council of Legal Education should recognise that this is the normal ambition of barristers and that most of them have a reasonable prospect of attaining it in a higher or lower sphere? Yet at present they do nothing to train barristers to fulfil this function.

I submit therefore that every lawyer, whether he devotes himself to private practice or the public service, has to make policy decisions demanding a knowledge of economics, political science and sociology, and that somehow an attempt should be made to teach him something about them. An equally strong case can be made out for a knowledge of psychology.[81a] The solicitor, barrister and judge all have to work on the basis of facts deduced from human testimony. Would it not assist them in weighing the value of this testimony if they knew something of the factors on which the human mind operates? Can the advocate's art be fully effective unless he can sense the psychological reactions of witness, judge and jury? The judge or magistrate in a criminal case has to pass a sentence best adapted to deter others and to reform the culprit. Can he adequately do this if he does not know how the criminal's mind works?

American Experiments.

The desirability of including such non-legal material in the legal curriculum has been more widely recognised in America than here, and this is natural because, as Professor Goodhart has recently reminded us,[82] in the States most legal problems are also political ones so that the lawyer's policy-making function is more obvious. The most vocally extreme advocates of this view are the Yale Law School, who have declared their intention of moving 'from legal realism to policy science in the world community'[83] and who 'take it as self-evident . . . that the study of law will be most fruitful and critical when the skills and perspectives of history, economics, statistics, psychology, political science, sociology, and psychiatry

[81] The phraseology is that of Prof. Fuller of Harvard (1 J.L.E. p. 187).
[81a] There is also, of course, a close relation between law (especially family law) and anthropology: cf. Mead, *Male & Female* (London, 1949).
[82] At the 1949 meeting of the S.P.T.L. (1949) J.S.P.T.L.(N.S.) 256.
[83] 56 Y.L.J. 1345. See also 52 Y.L.J. 203.

are fully and effectively used in the work of the law schools'.[84] This is an ambitious programme to cover in three or four years and attempts to live up to it do not as yet appear to be altogether successful. These attempts have been mainly on three lines[85]: (1) by requiring pre-legal studies in the other social sciences[86]; (2) by incorporating non-legal courses with non-legal teachers (this has been tried chiefly at Yale itself—which has drawn on the Harvard School of Business Administration—and at Chicago and Columbia); and (3) by having joint courses with other faculties. The Harvard School, perhaps more realistically, consider that Yale are in danger of losing sight of the fact that a law school's primary role is to teach law and they consider that 'the problem should be solved not by importing into the law faculties extra-legal talent but by selecting economics-conscious and economics-experienced members for inclusion in the faculty's professional personnel'.[87] Nevertheless they are at one with Yale, Chicago, Columbia, New York and the rest in recognising the need. 'For about twenty years now', says their Professor Fuller, 'American professors of law have been agreeing with one another that we ought to do something about the integration of law with the other social sciences.'[88] We in England could not say as much. At the most we might perhaps claim that for the last two or three years we have been disagreeing with each other on whether we ought to do something about it.

English possibilities.

For reasons which I have sought to explain, I think we ought to try to do something. But if it is to be done at all it must be mainly during the university part of the training, and without lengthening the total period of training. This precludes compulsory pre-legal training in the social sciences and special non-legal courses which would necessarily increase the length of the degree course.[88a] In America there was in fact a move to substitute a general four-year, for a three-year course,[89] and this was introduced for example, at Chicago,[90] but, doubtless for similar reasons to those applying in England, this does not seem to have caught on. One thing we can do is to follow Harvard and to plan our university syllabuses and select our teachers in the light of the need to

[84] Assen. of Am.L.S. Handbook, 1946, p. 61.
[85] For further details, see especially Brown, 'Lawyers, Law Schools and the Public Service', 43 Col.L.R. 423; 30 Iowa L.R. 326; 54 Harv.L.R. 775, and J.L.E. *passim*.
[86] See Vanderbilt, 'A Report on Pre-Legal Education', 1 J.L.E. 443.
[87] Leach, 1 J.L.E. p. 36.
[88] *Ibid.* Cf. 1948. *Ann. Survey of Am. Law*, p. 951: 'The chorus of opinion favouring a greater integration with major social problems . . . is well-nigh unanimous'.
[88a] If only for this reason I regard Prof. Binchy's solution as impracticable (*supra*, n. 60a).
[89] 9 Am.L.Sch.Rev. 566; 17 N.Car.L.R. 242.
[90] Katz, 'A Four-Year Programme for Legal Education', 4 Chi.L.R. 527.

integrate non-legal material in the legal curriculum. Even this is difficult enough, as the Americans have found, since it is exceptional for lawyers to have the necessary knowledge of other disciplines; most of us find it a full-time job to learn and keep up to date in a few branches of law without attempting to master all or some of the other subjects suggested by Yale. Nevertheless lawyers, even law teachers, are not completely devoid of outside knowledge and experience, and it is believed that they should know enough about sociology and economics to be able to give some indication of the social and economic reasons and consequences of the rules which they expound. The subject known as Jurisprudence is increasingly coming to be recognised, at any rate partly, as, in Mr. Cross' words,[91] 'the consideration of law in the terms of another social science such as logic, philosophy or sociology'. But the extent to which this approach can be fruitful is limited; any lawyer who attempted to deal with many of the economic aspects of commercial law would be rightly suspect in the eyes of professional economists.

Joint Seminars.

A more fruitful line of approach seems to lie in increased collaboration with other faculties, for which Professor Wade pleaded in his inaugural lecture.[92] In this respect the London School of Economics and Political Science is in an exceptionally strong position, certainly in a stronger position than the American law schools with their relative isolation from other faculties.[93] This is one of the great advantages of ensuring that the theoretical part of legal training is undertaken by the universities and not in a purely professional school. I doubt, however, whether we have yet done as much as we could to take advantage of these opportunities. Lord Chorley, Professor Robson and Dr. Kahn-Freund have blazed a trail but I should like to see it widened and, for example, joint seminars held with the economists to discuss such topics as taxation, monopolies and restraint of trade, freedom of company incorporation, and the legal rules regarding the payment of company dividends.

Critical Approach.

The inevitable and desirable result of widening the scope of teaching in the manner suggested would be to make the students,

[91] 21 Univs. Review, p. 16.

[92] 9 Cam.L.J. 286.

[93] It was possibly this that Prof. Simpson had in mind when he said: 'We are more likely to find fruitful ideas for the law schools of 2017 . . . in the educational films of the Army and Navy, and in the Institute of Advanced Study and the London School of Economics and Political Science than in the Lichfield Law School of pre-Revolutionary days or in the Inns of Court and the Cloisters of Oxford and Cambridge': 'Social Engineering Through Law (with Miss Field)' in 22 N.Y.U.L.Q. 145.

and ultimately, the profession, as a whole, more critical of our legal system. The present lack of interest by lawyers in law reform has been widely commented on and criticisms on this score and adverse comparison with other professions (notably the medical) will be found in the works of most of the writers previously quoted and many others. The May, 1949, number of the *Law Quarterly Review* contained an article by Sir Cecil Carr K.C. in which he repeated these criticisms [94] and another by Mr. Gerald Gardiner K.C. and Mr. Curtis Raleigh [95] which was a devastating illustration of it in connection with penal reform. The English profession is not alone in this attitude; similar complaints are made on the Continent and in U.S.A. But in the States there is at least an active minority of lawyers pressing for law reform and Professor Fuchs, of Indiana, can take pride in the part played by the Law Schools ' in having helped to create such a professional group and in having supplied it with some of the tools of the trade '.[96] In England such an active minority is very small if it exists at all and it has diminished rather than increased during the last 100 years.[97] As Sir Arnold McNair has pointed out,[98] the fault lies at the door of the Law Schools. ' It is we,' he says, ' who first handle the raw material of the profession, it is we who can, on the one hand either perpetuate the complacency with which for so long it has been the normal habit of our profession to regard the law . . . or, on the other hand, stimulate a critical faculty and a refusal to tolerate an abuse or a defect which is capable of removal by human agency.' Similarly, Professor Wade in his inaugural lecture [99] urged that we should ' teach law as a great human institution serving social and economic ends ' and ' in relation to its place in the world in which we live '. ' We lawyers ', he said, ' are apt to defend the law as it is against all criticisms from outside.' He confessed that his own legal education had left him believing that English law was the perfection of human reason and he expressed his anxiety ' to sharpen the critical faculties of the lawyers of tomorrow '. Professor Wade's confession would be echoed by many of us. Certainly I know of no one more legalistic than a law student at the end of his training. In very noticeable contrast are the students of economics to whom I have attempted to teach commercial law; in many respects they consider that the law is an ass and they do not hesitate to say so.

[94] 65 L.Q.R. p. 188 : ' Dare one suggest that . . . the profession itself gives no conspicuous and constant lead to our legislators '.
[95] *Ib.* p. 196.
[96] 1 J.L.E. p. 159.
[97] This decline was noted and lamented by Lord Bryce as long ago as 1893 in his Valedictory Lecture (*Studies in History and Jurisprudence*, Vol. 2, p. 504 at p. 517).
[98] Presidential Address to S.P.T.L. (1934) J.S.P.T.L. 1 at p. 3.
[99] 9 Cam.L.J. 286 at pp. 288 and 289.

Lawyers' Law Reform.

I do not of course suggest that law teachers are completely uncritical; on the contrary many of them spice their lectures and writing with criticisms of decisions from those of the House of Lords downwards. But when expressed in print these criticisms are apt to be so moderate and humble that it is sometimes difficult to be sure that they are criticism at all. As Lord Atkin reminded us,[1] ' Justice is not a cloistered virtue ', and more outspoken attacks on judicial decisions (such as are found in the American Reviews) would probably be a healthy development. Moreover in general their criticisms are of those rules which offend their own notions of *elegantia juris* rather than of those which cause social inconvenience or hardship.[2] One difficulty in the way of extending the nature of their criticisms and in encouraging an interest in law reform in general is the lawyers' traditional fear of becoming involved in politics.[3] For this reason a distinction, and perhaps a valid one, is sometimes drawn between ' lawyers' law reform ' and ' politicians' law reform '. Thus at the 1934 meeting of the Society of Public Teachers of Law, Professor Hughes Parry [4] distinguished between systematically weeding out rules which have become entirely obsolete or which fail to conform with current habits and ideas, and adapting the law so as to make it foster rather than hinder the growth of the social and economic life of the community. The former was permissible for lawyers, the latter was politics and forbidden. Some of his colleagues at that meeting thought that his limitation of the lawyers' role was unduly restricted, and so, with respect, do I. The rather different classification adopted by Sir Alexander Carr-Saunders seems to me to be preferable. He [5] says that it is of the utmost importance that the profession should make advances for reform and not, as at present, wait until they are asked, but that they should not take sides on broad issues of public policy on which every educated citizen should be able to

[1] *Ambard* v. *Att.-Gen. for Trinidad and Tobago* [1936] A.C. 322 at p. 335.

[2] This point was stressed in the discussion at the 1949 meeting of the S.P.T.L. and was illustrated by Prof. Goodhart by reference to the work of academic lawyers on the Law Revision Committee which did valuable work in eradicating certain of the more obvious inconsistencies in our law, and which should certainly be revived. On the other hand it undoubtedly did itself harm by devoting immense time and learning to a suggested abolition of the doctrine of valuable consideration. This doctrine is difficult to defend academically but causes little inconvenience in practice. On the rare occasions when it seems likely to do so the courts are astute to find a way round it (cf. *Central London Property Trust* v. *Hightrees House* [1947] K.B. 130), and the practitioner gets on quite happily by remembering ' when in doubt, stick on a wafer seal '.

[3] Cp. Prof. Karl N. Llewellyn (1 J.L.E. p. 219): ' The . . . difficulty is that policy, when seen in the large, is almost impossible to divorce from politics, and that the tradition of our schools has been a non-political tradition '.

[4] (1934) J.S.P.T.L. p. 10.

[5] *Op. cit.* p. 486 *et seq.*

come to a decision, for example, penal reform.[6] On the other hand they should press their policy on matters in which their technical knowledge makes them better judges, such as legal procedure, land registration and codification. It will be seen that the main difference between Professor Parry and Sir Alexander Carr-Saunders is that the former, if I understand him aright, would argue that lawyers as such should play no part, at any rate until asked, in such policy matters as penal and divorce reform, whereas the latter would agree that they should take the initiative in presenting facts to show that the existing position needs reform, although they should not take sides on the exact nature of the reforms required. Thus he would, I imagine, agree that although the legal profession should not advocate divorce by mutual consent they should do everything in their power to make clear to the public that at present most divorces are by clandestine consent. One thing at any rate is clear; that lawyers in their official capacity should not become involved in party politics. Certainly teachers should not; nothing can be more dangerous, both to teachers and students, than the suspicion that party politics are being introduced into their lectures. I hope that nothing I have said has suggested that I am advocating the contrary, although even here I am fully alive to the difficulty of knowing exactly where to draw the line.[7] But these difficulties should not, as at present, cause lawyers always to act as a brake rather than as an accelerator.

University Education—General considerations.

Before turning to a detailed consideration of the university syllabus there are two further general points to make. The general lines on which the university syllabus should be framed will, I hope, have appeared from what I have already said. If I were to try to summarise in one sentence I would say that the subjects to be included in the undergraduate course should be those which are fundamental to a proper understanding of the general framework of legal institutions and their place in the changing society in which we live. Whether or not this would be accepted there would at least be general agreement that, in Dr. Stallybrass' happy phrase, it is not ' the function of the University to provide the lawyer with the tools of his trade, so much as to teach him how to use these

[6] His illustration is an interesting one for Gardiner and Raleigh's article (*supra*) makes it clear how often they have taken sides on this issue—and generally the wrong side according to the judgment of posterity.

[7] The difficulty is well illustrated by the recent activities of the Yale Law School. It can hardly be doubted that it is right and proper for them to point out the consequences of the loyalty tests imposed on government employees (see 58 Y.L.J. p. 1). But what of the famous manifesto calling upon the U.S. President to abolish the Committee on the Un-American Activities (printed in 34 A.B.A.J. p. 16)? The English law teachers' attitude towards these problems is an excellent example of the attitude of ' negative neutrality ' which Sir Walter Moberley criticises in his recent ' The Crisis in the University '.

tools '.[8] But, and this is a point which sometimes seems to be overlooked, the fact that a subject is of practical value is no reason for rejecting it as unsuitable for university instruction. On the contrary, if a subject is otherwise suitable, the fact that it is practical is an advantage not a disadvantage.[9] In the past we academic lawyers have, I think, rather tended to make life easy for ourselves by rejecting any branch of the law based mainly on statute and by eagerly excluding anything which can conceivably be classed as emergency legislation. General principles, we have said, are enshrined in the common law, statutes merely lay down arbitrary detailed rules important only to the practitioner and outside our purview particularly if they are only intended to be temporary. Unfortunately the ground has been cut from under our feet by the modern technique of skeleton legislation, which aims at laying down general principles leaving the details to be filled up by Statutory Instruments, and which, more often than not, is theoretically only temporary. For example, any attempt today to teach the law of landlord and tenant without reference to the Rent Restriction Acts would be utterly unrealistic. The Rent Acts are, I think, a good example of the type of legislation which should be dealt with; apart from their practical importance they are interesting juristically and illustrate a reversal of Maine's statement that law develops from status to contract—landlord and tenant is now developing from contract to status.

The second point is this. Hitherto the practice of the English universities has been to prescribe certain subjects which the student must take, but to give him a wide choice of other subjects, particularly in his second and third year. This practice of options has a number of disadvantages. It leads to considerable and wasteful overlapping, it strains the resources of the teaching staff, and it makes it impossible for the teacher to assume a common fund of knowledge on the part of his students. Apart from this, however, it appears to me to be objectionable on general principles. If it is the task of the university to give the student a general theoretical background, the university should decide what subjects it is most vital for the student to know for that purpose; the choice should not be left to the student who has neither the knowledge nor the experience on which to exercise it. If it is left to him, he will, and this is precisely what happens at the moment, choose those subjects which are going to be most helpful to him in his professional examinations, thus defeating the primary object of the division

[8] (1948) 1 J.S.P.T.L.(N.S.) 157 at p. 161.

[9] The same point is made by Profs. Plant and Smith in their reservations to the Report on Education for Commerce at p. 72: 'A university career gives a student the opportunity for training in many accomplishments and we see no reason rigidly to exclude those which have a direct vocational value in business. [But] the universities should not design their courses leading to first degrees in such a way as to attempt to provide a complete vocational training for specific business appointments'.

between the universities and the professional bodies. I therefore believe that the subjects for the undergraduate course should all be required and not optional. It has been objected this would merely be to put the clock back since originally there were no options, which have been introduced as university law training has developed. Hence, it is said, it must be a retrograde step. This however assumes that the optional principle was deliberately chosen as a good thing; I know of no evidence to support such a conclusion. In fact it arose simply because additional subjects were introduced to keep pace with new developments or to keep in step with the professional bodies and that when they were introduced conservatism or vested interests generally prevented others being removed to make room for them. In America, where the matter has now been considered on its merits, the strong tendency is to reduce the number of options if not to eradicate them altogether.[10]

If options were to disappear, either more subjects would have to be taken by every student or a number of subjects which are at present taught would have to disappear from the undergraduate course and be taught by the universities, if at all, to postgraduate students only. In England we already require far fewer subjects than the American schools but I am sure that we are right to do so and that no increase is advisable. The American law schools are in a different position as they have to act both as university and professional schools; in any case it is becoming recognised that their syllabuses are over loaded. The second alternative would therefore have to be adopted. Some subjects at present taught at most universities I should like to see disappear altogether; for example I regard conveyancing as essentially a practical craft which can only be learnt by practice aided by instruction from the professional law school. The general principles of land law are suitable, I think vital, for university legal studies, but the technical machinery of conveyancing is not.

I have already emphasised that uniformity of university syllabuses is not an essential part of my proposals; indeed, a certain amount of local variation is a good thing since without it new experiments would be impossible. Nevertheless, having declared that it is for the university to decide upon a fixed syllabus, I feel that I must go boldly forward and give my views on what that syllabus should be. For what it is worth then, here it is. It is based on the assumption that not more than four subjects should be studied each year.

University education—a suggested curriculum.

Right at the beginning, as it seems to me, the student should be taught the organisation of the judicial system and of the legal

[10] Brown: *Lawyers, Law Schools and the Public Service*, pp. 95 *et seq.* A similar tendency has been discerned in arts faculties of the English universities.

profession, the doctrine of precedent, the interpretation of statutes and documents and elementary legal bibliography. Many English universities cover part of these matters in a course known as the English Legal System, but, so far at any rate as this university is concerned, this course has tended to become one in superficial legal history. Some instruction is certainly given on the courts, the profession, precedent and statutory interpretation, but little or nothing on the interpretation of documents and nothing at all on legal bibliography and the use of law books. The last subject seems to me to be a particularly vital one. We cannot claim to have taught lawyers how to use the tools of their trade unless we instruct them in the use of textbooks, reports, digests and indices, and they cannot derive much benefit from the rest of their training until they know how to use them. But at present this seems to be largely left to the student to pick up as best he may. No teacher ever told me about that essential work the *Index of Legal Periodicals*, nor, so far as I remember, about the use of digests of cases, and I remember that for some time I had an exaggerated admiration for the industry and erudition of the late Lord Halsbury under the mistaken belief that he had written the whole thirty-seven volumes of *The Laws of England*. I should, therefore, like to see the course on the English Legal System altered in its nature so that it approximates to what some American universities call Legal Method.[11] The present emphasis on History I regard as mistaken. I doubt very much whether any attempt to cover the whole of legal history in one year is practicable at all and I am sure that it is mistaken to attempt it in the first year. In fact, I share the view of Dr. Stallybrass [12] that legal history should not be taught as a separate subject but in relation to each particular branch of the law. Moreover, the history of a rule should be taught primarily to indicate the reasons for the rule; merely being told that a rule was laid down in the seventeenth century is valueless, what is valuable is to be told why it was laid down in that century.

In another course the student should be given a bird's-eye view of the whole field of law, sufficient that is to say to let him see what the scope of English law is and the nature and general content of each branch. The student setting out to explore the legal territory should surely be taught something of its geography? In fact in this university we try to teach this to economics students in a course known as Elements of English Law but the law student gets it, if at all, only in the English Legal System course with its emphasis on the past rather than the present. Many branches of the law are never drawn to his attention during the whole course of his training, and even to this day there are some subjects which

[11] Legal bibliography is sometimes a separate course in America (see 1 J.L.E. p. 361, and 2 *ibid.* 61).

[12] (1948) 1 J.S.P.T.L.(N.S.) p. 163.

I view with a vague resentment as if they had no right to exist since nobody told me about them when I was a student.

Another traditional first-year subject is Roman law, which is still retained not only by the universities but in the Bar examinations. The question of what part Roman law should continue to play in modern legal education is one of the few branches of my subject which has been fully ventilated and a further detailed discussion would be otiose. The fullest and best recent consideration is by Mr. Rupert Cross,[13] whose conclusions, with which I agree, are that it has no direct practical value whatsoever[14] and that its retention in the Bar syllabus is a relic of the past view that ' to have some knowledge of Roman Law was culture, to have some knowledge of the history of English Law was pedantry ', but that as a comparative study it has educational value as an antidote to the insularity of English law; and that if retained at all it should therefore be at a later stage in the curriculum.

Other subjects which have some claims for consideration as first-year subjects are constitutional law, criminal law, contract, public international law and jurisprudence. There will be general agreement that constitutional law (a traditional first-year course) should be retained, but there are grave objections to any of the others. Criminal law and contract are too technical and demand a previous background, international law cannot be a fruitful study in the absence of any former legal knowledge and jurisprudence is fundamentally a subject which, in the main, should be taught at the end of the training and not at the beginning. Nevertheless there is, I think, some justification for dealing at the beginning with certain matters which are at present taught, if at all, in the courses on jurisprudence. Thus the suggested course on legal method would include certain aspects of analytical jurisprudence and at this stage too the student should not only be taught the geography of the legal field but also given some idea of how this fits into the sphere of the social sciences as a whole.

This discussion suggests that the first-year subjects might perhaps be re-organised under the following heads:—

1. Legal method and the place of law in the social sciences.
2. The English legal system.
3. Elements of English private law.
4. Constitutional law (or elements of English public law).

This would, it is submitted, ensure a really sound groundwork and avoid the necessity of trying to teach technical subjects before that groundwork has been acquired.

In the second year, the hard core of the whole course, the subjects suggested are contract, tort, criminal law (including some

[13] 21 Univs. Review 16.

[14] For a rather different opinion see Jolowicz : ' Utility and Elegance in Civil Law Studies ' (65 L.Q.R. 322).

criminology and penology[15]) and land law. There will not, I imagine, be any dispute that the first three of these are essential and that, in view of their inter-relation, it is most advantageous to teach them in the same year. Not all agree to the inclusion of land law [16] but to my mind it is impossible to profess a knowledge of the basic principles of English law without knowing something about the law of real property on which it is built. Students undoubtedly find it a difficult subject and generally not a very interesting one, but this is possibly because the teaching still runs on traditional and outmoded lines with too much emphasis on obsolete technicalities and too little on the modern position of the landowner in relation to the community. More realistic approaches are being attempted in America.[17] Land law should I think include the law of trusts. They are generally taught as separate subjects but it is quite impossible to understand the one without the other.

For the third and final year I suggest administrative law, family law, jurisprudence and comparative law. The ever-increasing importance of the first of these seems a sufficient justification for its inclusion but it is arguable that it could be left for the subsequent professional training in which case general equitable principles and trusts could be substituted, thus avoiding what may be thought to be the overloading of land law. In this event I would prefer that trusts should be studied in the second and land law in the third year. Family law, which we are proposing to introduce into the syllabus of the London LL.B., seems to me to be absolutely essential. Not only is it a subject of the utmost practical importance but it is ideally suited for the sociological approach which I have advocated. The difficulty with most subjects is that the lawyer has not the necessary knowledge of the other disciplines involved, but in the case of family law the sociological implications are relatively simple and within the experience of both the teacher and his class. There will also be general agreement that jurisprudence should be included and that the right place for it is in the final year, but there will be less general agreement on its content.[18] In London we include analytical jurisprudence, historical jurisprudence, and theories of law, but, recognising that this is more than any one man can digest in a year, we allow such a wide choice of questions in the examination that the student can in fact specialise. I should like to see analytical jurisprudence dropped (whatever is most valuable in it would I

[15] This would necessarily direct the student's attention to psychology and once his interest is aroused he is likely to pursue this fascinating topic more deeply. Even a superficial knowledge might prevent some of the worst excesses of the traditional attitude towards, for example, sexual offenders. In any case it seems inexcusable that a barrister can be elevated to the bench to deal with criminal cases without any knowledge of penology.

[16] See Stallybrass, *op. cit.*

[17] McDougal and Haber's *Property, Wealth and Land.*

[18] For a recent American discussion, see 1 J.L.E. 475–507.

hope have been covered elsewhere) and the subject treated primarily so as to illustrate the place and development of law in a changing society, on the lines of Simpson and Stone's monumental source-book *Law and Society*.[18a]

The most disputable suggestion is comparative law since many will consider that Roman law should be retained instead. There are two main objections to Roman law at this stage: (1) it demands a knowledge of Latin, possessed by an ever-decreasing number of students; and (2) if its purpose is comparative it seems better to compare a modern system with other modern systems rather than with one designed to meet the totally different social conditions of the Roman Empire. In London we have met the first objection by allowing the subject to be studied in English translations, a solution which does not shock me so much as it shocks the purists, though it possibly detracts from the high cultural value which the subject is alleged to have. As regards the second, Professor Jolowicz in a plea for the increased recognition of the utility of Roman law admits that 'it is only when the Roman materials are seen in the light of subsequent "civilian" developments that their full value for the understanding of the law can be realised'[19] and Roman law so taught seems to approximate to what I understand by comparative law. The main argument raised against the latter is that we lack the resources to teach it. But do we? We now have a number of excellent textbooks,[20] and other materials,[21] and most English universities are fortunate enough to have upon their staffs distinguished lawyers from the Continent admirably qualified to teach it. One of these, Professor W. Friedmann, has recently published[22] a syllabus for a course on this subject at his new university of Melbourne, which has the advantage that all the necessary materials are readily available in the English language (though I must here point out that in any case present day students are far more likely to understand French and German than Latin). Scots law is sometimes suggested as preferable to either comparative law or Roman law, and it is already an optional subject at Cambridge though apparently not a popular one.[23] It would however be an insult to our friends north of the border to suggest that the whole of their mature system can be disposed of in a one year's course and obviously the most that is practicable is to deal with broad general principles and a few selected topics. This

[18a] Cf. Binchy, *op. cit.* n. 60a, *supra*. The present teaching of this subject in London is certainly not as bad as Prof. Binchy believes it to be at Oxford.
[19] 65 L.Q.R. 322 at p. 336.
[20] *E.g.*, Gutteridge, *Comparative Law*; Buckland and McNair, *Roman Law and Common Law*; and Goldschmitt, *English Law from the Foreign Standpoint*.
[21] *E.g.*, Bryce's essays, the series of comparative studies on frustration of contract in recent issues of the J.Comp.Leg., and Lawson 'The Passing of Property and Risk in Sales of Goods' (65 L.Q.R. 352).
[22] (1949) 1 J.S.P.T.L.(N.S.) p. 274.
[23] (1947) 1 J.S.P.T.L.(N.S.) p. 108.

being so, it seems to me to be more profitable to consider these principles and topics in a rather wider sphere as is done in Professor Friedmann's course. I also suspect that most English universities would have much more difficulty in finding a qualified Scottish lawyer.

I appreciate that there is nothing at all novel or revolutionary about the syllabus which I have just suggested, which is probably far more traditional than might have been expected in the light of my preliminary remarks. Many American teachers would go much further and would sweep away the old subject-headings and re-classify legal material on a functional basis. Our Professor J. D. I. Hughes has also pleaded for a similar re-classification.[24] To my mind however all divisions are necessarily arbitrary, based purely on convenience, and our traditional divisions seem to me to be as convenient as any. What is vital is that the student should not be encouraged to keep his law in water-tight compartments labelled contract, tort, land law, etc., but this can best be done, not by introducing different but equally arbitrary compartments, but by the method of teaching and, especially, examining. I also appreciate that strong arguments can be put forward in favour of continuing to teach many subjects which my syllabus omits. The omission which I personally most regret is that of the law of evidence, not because of its practical importance, which can be exaggerated (except in criminal cases no branch of the law is more consistently disregarded in practice), but because, as Dr. Stallybrass said,[25] it can be quite fascinating and is closely related to other university studies in its consideration of the nature of proof. It is also one of the most characteristic branches of English law. On the other hand, it is envisaged that its basic principles, such as the process of examination, cross-examination, and re-examination, and the hearsay rule, would have been touched on in the first year; without a knowledge of these it is quite impossible to understand the workings of the judicial system and the true meaning of the rule of law. In any case, we cannot cover everything and have to select the most fundamental and omit the rest, and I cannot persuade myself that evidence in detail is as fundamental as those I have mentioned. The suggested syllabus to my mind contains as much as a student should try to absorb in his first three years and the remainder must be left to postgraduate study or the professional law school.

The Professional Law School Curriculum.

This brings me to a consideration of what should be included in the syllabuses of the professional law school. Here again the compulsory courses should not attempt to cover every conceivable

[24] (1932) J.S.P.T.L. p. 1 at pp. 5 *et seq.*
[25] (1948) 1 J.S.P.T.L.(N.S.) at p. 163.

branch of law; these are now far too numerous and complicated. The two branches of the profession must therefore decide which are essential for their respective members and most of the subjects which they select will obviously be common to both branches. Others will be essential for one or other branch only and the remaining subjects, of a more specialised nature, should be optional courses only, possibly for special diplomas.

On this basis I suggest that the following should be compulsory subjects for both barristers and solicitors:—

1. Mercantile contracts, especially agency, sale of goods and negotiable instruments with particular reference to cheques.
2. Partnership and company law.
3. Evidence and civil and criminal procedure.
4. Trusts and administration of estates.
5. Landlord and tenant (including rent control).
6. Industrial law.
7. Conflict of laws.
8. Revenue law, and
9. Legal ethics.

Except for the last two I do not think that I need elaborate any of these, which in the main are covered by the existing syllabuses of both professional bodies. By revenue law I mean principally income tax, death duties and a certain amount on stamp duties and exchange control. The first two of these are of such importance that no practitioner can regard himself as properly qualified on anything unless he knows something about them. They are, of course, included in the present Law Society syllabus but, incredibly, are omitted from that of the Council of Legal Education. The resulting ignorance of the great mass of barristers on these two subjects is perhaps their greatest professional handicap. It has led to the growth of a small group of specialists, generally former revenue officials, to whom it is frequently necessary to refer, in addition to another barrister, in any matter involving revenue questions, as most matters now do. This is beneficial to the group but detrimental to everyone else, especially to the lay client.

The last suggestion, legal ethics, is a novelty in England as a subject for institutional instruction.[26] Its content, as I see it, should be the relationship between the two branches of the profession and the rules of professional etiquette and conduct applying to each, both generally and in connection with legal aid. It can hardly be denied that these are matters which every practitioner should know, but every suggestion that he should be taught them is met by the objection that they cannot be taught but must be acquired in practice. The not unconvincing answer is that the subject is in fact taught elsewhere; for example in Australia and the U.S.A.

[26] But the Secretary of the Law Society has recently lectured on it and at one time Dr. Blake Odgers lectured to Bar students on Legal Etiquette.

The danger, admittedly, is that the teaching may become little more than preaching and anecdotes, but in the English divided profession there should be a sufficient body of legal or conventional rules to enable this danger to be avoided. It is quite true that much of the subject should be acquired in practice, but in the school of experience one learns from one's mistakes and this is not a subject in which mistakes should be allowed to occur. The rapid growth of the profession and the influx of a number of lawyers trained initially in other systems with different (I do not say lower) standards of professional conduct has made the need for organised instruction imperative. I do not think that any experienced practitioner would deny that present standards of professional conduct are not what they were before the war, and, unless something is done about it, it seems inevitable that as the profession expands standards will continue to fall.

In addition to these subjects common to both branches, Bar students should be required to take either matrimonial causes or conveyancing, and a practical course on pleading. It is arguable that both conveyancing and divorce should be compulsory, but as students will already have taken land law and family law at the university it seems to me that it should suffice if they choose one or the other for their professional training; divorce is not of much value to those intending to practise at the Chancery Bar or conveyancing to the common lawyer. I reluctantly conclude that it is impracticable at present to attempt institutional training in advocacy, but if we ever introduce the use of training films this gap could be filled.

Similarly potential solicitors would be required to take conveyancing, and either matrimonial causes, or magisterial law or local government law. The Law Society might also insist on book-keeping and trust accounts which at present form the non-legal part of their Intermediate syllabus. I certainly think that these would be better taken immediately before qualifying; at present, in my experience, articled clerks take them early in their articles and then deliberately forget them as rapidly and completely as possible. On the whole, however, I do not think that it would be necessary to retain either. The student would learn all he needs to know on these subjects in the courses on trusts and administration, and legal ethics.

The many remaining subjects, such as patents, trade marks, copyright, insurance, shipping and Admiralty practice and bankruptcy and winding up, should I think be left to optional courses which could be taken at any time after qualifying. To encourage specialists to take these courses diplomas might be awarded.[27] It would also be advantageous if special optional courses were offered

[27] For a similar suggestion in America see Bradway, 33 J. of Am.Jud.Society 17 at p. 22.

on subjects, such as town and country planning and compulsory acquisition, already covered in less detail in the compulsory courses. Indeed, it would probably be desirable if the number of compulsory subjects could be reduced as it may well be thought that the curriculum is still overloaded. On the other hand it must be remembered that under these proposals there would only be one compulsory professional examination which would supersede all the present barristers' and solicitors' examinations including, of course, the present separate Solicitors' Honours Examination.

IV. Teaching Methods

Lectures v. *Tutorials.*

I now turn to a consideration of our present methods of teaching. In this country we are still wedded to formal lectures supplemented by tutorial classes. There seems to be general agreement that tutorials are more valuable than lectures, but there is a reluctance to drop the latter altogether. On the whole I think this reluctance is sound. Oral lectures are (or should be) more stimulating than the written word and, although the good student can undoubtedly dispense with them, if the average pupil were left to obtain from his own reading what he is at present given in lectures the effect would probably be to convert tutorials into monologues from the teacher instead of general discussions on particular points of difficulty. Moreover lectures have become far less formal. The days are past (at least I hope they are) when the lecturer dashed in at five minutes past the hour, gabbled dictation until five minutes to the hour, barked forbiddingly ' any questions? ' and then dashed out again. Now, I think, it is universal for questions during the lecture to be encouraged and for a considerable part of it to be taken up in discussion. This tendency towards informality can of course be overdone; if lectures become slovenly it destroys one great merit which they have even for the good student. If teachers can give really good lectures a great impression is left on the student's mind. He sees an example of clarity of thought and lucidity of expression, and, if he can be brought to admire these qualities, which are particularly valuable to the potential advocate, he will in some degree seek to emulate them.

Nevertheless, it is probably still true that students, if not teachers, tend to over-emphasise the importance of lectures and to assume that questions not covered there need not be known and cannot fairly be asked in examinations. This impression must of course be corrected; the virtues of lectures are destroyed if the lecturer is forced to cover every topic in the syllabus but the examinations should be on the syllabus and not on the lectures.

The Casebook System.

In the U.S.A. formal lectures have, of course, been to a considerable extent superseded by the casebook system. Under this

the teacher prepares printed or cyclostyled material (mainly reports of cases) with which each member of the class is supplied. The students are told to prepare certain portions which are then discussed in class until the teacher is satisfied that the students have grasped the full implications of the case discussed. It is argued that this system teaches the students a sounder technique because they themselves hammer out the law from the cases whereas our lecture system tends to give them the false belief that cases are merely illustrations of pre-existing principles. The system has undergone considerable modification since it was first introduced by Langdell at Harvard in 1870, particularly since the publication in 1914 of Redlich's famous Report on it for the Carnegie Institute.[28] The so-called ' casebook ' of today is generally a weighty printed source-book containing, not only cases, but also statutes, articles and often a considerable amount of non-legal material. Many observers, for example Professor Laski,[29] consider this system much superior to ours, but others are not convinced.

Never having seen the American system in operation I hesitate to express an opinion, but it does seem to me that some writers have over-estimated the differences between the two systems. The description of the American system as ' the case system ' in contra-distinction to ours is misleading. It is true that in our lectures we tend to present the students with principles using the cases as illustrations, but in our tutorial classes we use an inductive method very similar to the American. The real difference is that the Americans use case-*books* to a far greater extent than we do. In part this is forced upon them by American conditions; with the courts of every State and the Federation pouring out decisions the bulk of case law has now become so great that undergraduates cannot be expected to find their way about it and a selection has to be made for them. In England we encourage students to make their own casebooks from the original reports and I cannot but think that this is a better training in the use of the tools of their trade.

Moreover, despite the extension of the scope of casebooks the method is only really adapted to a legal system which is predominately judge made. The American schools can ignore statute law to a far greater extent than we can, because they do not purport to teach the law of any particular State, but general principles of American law which are, of course, still primarily embodied in case law and not legislation.

Another difference between the conditions in the two countries is that while we rely to a great extent on practical apprenticeship, in America legal training is concentrated in the law schools. Hence

[28] ' The Common Law and the case method in American University Law Schools ', by Josef Redlich. For discussions of the report see 4 Am.L.Sch.Rev. p. 91.
[29] *The American Democracy*, p. 371 *et seq.*

the English law schools do not need to emphasise to the same extent the practical technique of using reported cases; indeed, it is probably advisable that we should place more emphasis on principles to counterbalance the essentially empirical knowledge derived from apprenticeship. In his most stimulating introduction to the English edition of President Karl Renner's *Institutions of Private Law* my colleague Dr. Kahn-Freund has attributed the differing outlooks of the Continental and English lawyer to the fact that the former is trained in the university to rely on abstract principles of logic while the latter is trained in the school of experience to treat each case on its merits. It is an interesting speculation whether, if the American law schools had continued to rely on formal lectures, the university-trained American lawyer would not have veered away from his English colleague and tended more towards the thought-processes of the Continent, a tendency which might have been encouraged if the re-statements of the law, which in form do not differ greatly from the Continental Codes, had ever come to be used as the basic teaching texts. It may be that it was Langdell's invention of the casebook system which has been responsible for preserving the essential unity of Anglo-American jurisprudence.

Be that as it may, I am far from being convinced that the casebook method would be superior for our purposes to the present tutorial system. In particular, I find it difficult to believe that discussion classes of fifty or a hundred students (such as are common in America) can ever be as fruitful as our tutorials of five or six.[30] This, however, is not to say that casebooks of the American type would not be welcome; on the contrary, as Professor Graveson has pointed out,[31] they could be most advantageously combined with our traditional methods. Tutorial classes are at their best only when the relevant law reports and statutes are immediately available and this, alas, is all too rarely the case. If each student had a casebook in front of him it would immensely simplify the teacher's task. Although this has long been realised the reason why there have been no English casebooks of the American type is, as Professor Hollond pointed out,[32] an economic one. Such a book is essentially personal to a particular teacher and designed as material for his own course. With the vast classes prevalent in the States it is commercially possible to reproduce this material at

[30] I understand that in recognition of this, Chicago, one of the most progressive of the American schools, has recently introduced a tutorial system not dissimilar to ours. Of course most American law schools have small seminar classes for advanced students. The great problem of the American schools is the size of the classes, and their teacher-student ratio is as a rule nothing like so favourable as ours.

[31] 25 J.Comp.Legis. 54.

[32] (1938) J.S.P.T.L. 4.

an economic price, but with the small numbers prevailing in England the cost of such a book would be prohibitive. Professor Hollond suggested that this objection might be met if a number of law schools combined to produce agreed casebooks and in fact the Society of Public Teachers of Law experimented on these lines. But the experiment was not successful; even if we have a common curriculum and common syllabuses, methods of approach will differ and lecturing is far too individual a matter to permit of mass production.

Students' Societies.

Another teaching aid of which considerable use is still made both here and in America is that of students' law societies to organise debates and moots, a method of instruction which dates back to the earliest days of the Inns of Court. Their importance to a budding lawyer can scarcely be exaggerated; they teach self-confidence, self-expression, and the ability to think on one's feet, all essential attributes of an advocate. Generations of London law students will testify to the value they derived from the University of London Law Society and the various college societies and many now distinguished members of both branches of the profession still remember arguing their first case at one of their moots—and many of them have never taken such pains with any case since.

P.M.L. Centres.

There are three further methods of instruction of which much greater use is made in America than here, and all of which seem to be valuable. The first of these is the use of law clinics, which correspond to our Poor Man's Lawyer Centres but which in the States are often organised by the law schools. The virtue of these is that they give the student practical experience, and this is admittedly less necessary here where we still rely on practical apprenticeship. Nevertheless, I believe that far too little use has been made of P.M.L. Centres to supplement experience in office or chambers. I always encouraged articled clerks to attend P.M.L. Centres either as observers or to assist in the preliminary interviewing of applicants. Not only did they there see a type of practice very different from that of a City or West-end firm, but they were taught the invaluable lesson that the practitioner's major difficulty is not to know the law but to know the facts. Law school training encourages the belief that the relevant facts, no more and no less, are presented neatly docketed to the lawyer, who merely has to apply the appropriate legal rules. No student who has had to wrestle with an illiterate but garrulous female complaining about the conduct of her neighbours is likely to labour for long under this misapprehension. I have also referred to the desirability of imparting some knowledge of psychology, and work as a poor man's lawyer

is likely to stimulate his interest in this science and give him valuable experience in trying to apply his knowledge. It is also a fact that such work may also give some experience in the exercise of judicial functions for not infrequently both parties will lay their cases before the lawyer and ask him to arbitrate. There is nothing more satisfying than to have two parties arrive at arm's length and leave arm-in-arm; and there is no more salutary corrective of self-complacency than to find how frequently one of them returns next week to complain of the other's breach of the short-lived reconciliation.

I therefore think that P.M.L. Centres might have been made to play an important part in legal education and it is one of the few unfortunate consequences of the new Legal Aid Scheme that this will no longer be possible once the scheme is in full operation. Newly qualified lawyers will be able to gain valuable experience under the scheme to a far greater extent than heretofore, but, as I see it, students will not be able to ' sit in ' during the period of their apprenticeship. However, this cannot be helped. I certainly do not suggest that law schools should run unofficial law clinics on the American lines in competition with the legal advice centres, but the law schools might make greater use of the P.M.L. Centres until these are superseded.

The Law Review.

The next institution, which plays a vital part in American education but which is virtually unknown here, is the Law Review. Nearly every American law school publishes its own Review, which is edited mainly by students and partly written by them. It is the ambition of every bright student to ' get on the Law Review ', which is the blue riband of scholastic distinction, and once he has become a member of the editorial board he will devote a very considerable proportion of his time to his editorial duties. The weakness of the system is that it is only the best students who benefit from it and that it tends to widen the gulf between them and the less bright [33]; in an attempt to minimise this consequence some of the larger schools publish an additional intra-mural Review. However, the work of preparing case notes and similar contributions for the Review is undoubtedly of value and there is no more powerful stimulant to the novice than the possibility of seeing himself in print. There therefore seems to be room for experiments on these lines in England, although it is to be hoped that the Review will never be made the fetish that it has become in the

[33] See the poetical lament of one of the latter quoted in 1 J.L.E. p. 107. On the other hand it is argued that the Law Review students can always be counted upon to keep the teachers up to the mark by their questions and discussion and thus contribute to the success of the case book system. As against this it must be remembered that all too often ' Law Review ' students take little or no part in the ordinary courses but devote themselves to Law Review work.

States. At present we only have one Review in any way comparable —*The Cambridge Law Journal*—and this only appears once a year (instead of at least quarterly) and rather less is done by students than is normal in America. For a time the Law Society's School ran an excellent magazine (*The Bell Yard*) and the Inns of Court School has just produced a less ambitious periodical (*Glim*), but the long-held ambition of the University of London Law Society to sponsor a *London University Law Review* seems no nearer attainment than it was twenty-five years ago. What is wanted, I think, is not so much further learned periodicals as intra-mural Reviews to which all students will be given an opportunity of contributing.

Films.

The last American experiment to which I wish to draw attention has, I think, the greatest future of all. I refer to training films. The use of these for legal education is still in its infancy in the States and is unknown here, but I agree with Professor Simpson [34] that its possibilities are immense. Anglo-American law teachers rightly claim that one of their greatest advantages in making their teaching interesting is that the law is derived from cases with picturesque and easily remembered facts, but hitherto we have not been able to present these facts in the most impressive way. How much more arresting would be an actual portrayal on the screen. Imagine the impression on the student of actually seeing the decomposed snail float into Mrs. Donoghue's glass from Messrs. Stevenson's bottle [35] or of watching Mrs. Carlill inhale from the carbolic smoke ball only to succumb to influenza notwithstanding.[36] No student would ever forget it. Nor I hope would he forget the effect of the judgment which, suitably cut, he could see and hear the court delivering. In time perhaps the more photogenic judges will allow talking films to be made as they deliver judgment but in the meantime studio reproductions will do very well. In the Middle Ages the judges allowed the apprentices to sit on the Bench; by the aid of films we can go one better and bring the Bench into the class-room. I prophesy therefore that the casebook of tomorrow will be found in the film library. Films will also be particularly useful to the professional law school in teaching the more practical subjects and crafts. At present it is virtually impossible to make interesting the teaching of court procedure; with the aid of a film it could be made vivid and instructive and American experiments have been directed on these lines.[37] Similarly I have long felt that

[34] 22 N.Y.U.L.Q. 145, and 59 Harv.L.R. p. 710 *et seq.*
[35] *Donoghue* v. *Stevenson* [1932] A.C. 562.
[36] *Carlill* v. *Carbolic Smoke Ball* [1893] 1 Q.B. 256.
[37] As in their film 'Trial by Jury'. This is a non-musical not to be confused with the Gilbert and Sullivan opera with the same title. For further information see *The Organisation and Operation of Continuing Legal Education*, the Handbook of the Committee on Continuing Legal Education of the A.L.I. and

company law demands film treatment, and that is certainly a way of attempting to teach advocacy. Examples could be multiplied. A University Film Bureau has recently been established in England but I am unable to ascertain whether it has considered experiments of this nature.

These are by no means the only experiments which have been made in America (on the contrary there are dozens of others [38]) but I have selected them because they seem to be those which could be most advantageously adapted to English conditions. Subject to correction, I do not think that as regards teaching methods (as opposed to examinations) we have anything to learn from Continental practice. In particular, our smaller classes and closer personal relations between teacher and student seem in every way superior.

V. Examinations

During the last 100 years the legal profession has come to rely more and more on examinations at every stage of training from initial entry until final admission to practice. Their importance can therefore hardly be exaggerated; the whole character of the instruction must be to a large extent dependent on the character of the examinations.

Present Type of Examination.

In general these are now exclusively written; except at Oxford, *viva voce* tests if held at all are perfunctory and based on the principle that a candidate can do himself no harm but may, if he is on the borderline, do himself some good.

The questions asked in the written examinations fall roughly into three classes:

1. Pure tests of memory on points of detail. For example: 'What is the order of succession in the case of deaths after 1925?' This type is still common in the professional examinations.
2. Essay questions. For example: 'Sketch the history of freehold tenures'. This type is found principally in the university examinations.
3. Hypothetical case problems. This type is now increasingly common in both university and professional examinations and there is no need to give examples.

A.B.A., at p. 18 *et seq.* Apparently, by the process known as 'kinescoping' (*i.e.*, filming a television programme), a one-hour film can be produced for as little as $2,500.

[38] Several illustrations appear in every issue of the J.L.E. One, which is strongly supported by those with experience of it, is the institution of group research. Not only does this lead to valuable work being done but it is a less formidable and frightening step for the last-year university student than having to write a long dissertation all on his own.

If it is conceded that the object of a university examination is to test the candidate's understanding of principles rather than mere knowledge, it follows that only questions of the second and third type have any value. Similarly if the object of the professional examinations is to test practical proficiency then only questions of the third type are appropriate. Hence it is becoming widely recognised that the problem question is the most valuable type of all.

Criticisms.

But the value of even the problem question is reduced by a number of factors. In the first place, even there memory plays a disproportionate part since the candidate in the examination room is unable to refer to the authorities. The good lawyer is not one who relies on his memory and claims to 'know the law', but one who refuses to rely on his memory but knows where to look up the law. This inability to use the normal tools of our trade militates particularly against the effectiveness of written papers as a practical test in the professional examinations. No one, I imagine, would attempt to test the practical proficiency of a carpenter without allowing him to use his tools, but this is precisely what we do when trying to test the practical proficiency of a lawyer.

Secondly, in all English legal examinations, the time factor plays a disproportionate part. The examinations are a race against the clock and victory goes to the fastest thinker and writer and not to the most profound and careful. I am not suggesting that the qualities displayed by the fortunate possessor of an examination technique are valueless; on the contrary the ability to think clearly and quickly, and rapidly to separate the essentials from the non-essentials, is most important and useful.[39] At the same time our passion for speed seems excessive. It reaches its climax in the Solicitors' Final but applies to a greater or lesser extent to all other examinations.

Thirdly, the form in which the problem has to be presented makes it misleadingly simple as a practical test. In practice the facts are not presented to the lawyer with the irrelevancies separated from the relevancies. He has to ascertain, as best he may, what the true facts are and then decide which of them are relevant and what are the appropriate legal rules. In an examination, however, the facts, and only the essential facts, are supplied to him and there is therefore no test at all of one of the most important and difficult techniques, that of finding out the whole truth from someone possibly trying consciously or unconsciously to conceal part of it, and of deciding which of the facts so elicited are relevant. Even the

[39] I think that this feature of our examination system may account for the less discursive approach of an English lawyer as contrasted with that of his Continental colleague.

subsequent problem of deciding upon the relevant legal rules is over-simplified, for the heading of the paper will tell him what branch of law is concerned and he is not expected to consider any others. In practice, problems do not arrive appropriately labelled and all too often they do not fit into any one water-tight compartment.

Under present-day conditions no steps are practicable which would completely eradicate these defects. If we only had to deal with half-a-dozen candidates it might be possible to place them in a law library and allow a representative selection of clients to consult them, but when we have to deal with five or six hundred this is not feasible. On the other hand, a consideration of Continental examination methods suggests that we might go some way towards improving the quality of our tests.

The German System.

The German system, which I select as typical, involves two State examinations, one at the end of the university course and the other at the end of the practical experience as *Referendar*. The former consists of (a) a complicated legal problem which has to be answered by a thesis prepared at leisure, (b) a series of papers (five hours being allowed for each) answered under supervision but with the use of the appropriate codes, and (c) an oral examination lasting one or two days for a small group of candidates. The second examination is similar except that two questions, one theoretical and the other practical, have to be answered at leisure, and that the practical question consists of an actual case and all the papers involved in it are sent to the examinee who has to prepare a written judgment. This system goes far towards eliminating the defects to which I have drawn attention and I suggest that its best features might be adapted for use in England, perhaps on the following lines:

Suggested Reforms.

The university examinations should still consist primarily of papers written under supervision in a fixed time but there should be far fewer questions in each paper. I would like to see papers of only four questions, two of the essay type and two problems, one of each type to be answered in three hours. But the problems would be very different from the present type; there would be a lengthy statement of facts relevant and irrelevant and several different legal points would be involved.[39a] If all subjects were required and none optional each problem could involve several different branches of the law. Moreover, the candidate would be supplied in the examination room with copies of any relevant

[39a] Only on this basis would it be reasonable to reduce the number of questions to the extent suggested; the German practice has been criticised as going too far in this direction.

statutes. In the final university examination the candidate should also be required to prepare at leisure a short thesis on which he would be cross-examined at a lengthy and thorough *viva voce*.

The professional qualifying examination should consist exclusively of practical problems. The bulk of these would be answered in the examination room under supervision, and one question in each paper would probably suffice. For example, in conveyancing, the candidate might be given a contract of sale and abstract of title and asked to prepare requisitions and draft the conveyance; in divorce he might be supplied with the case papers and required to advise on evidence and settle the petition; in company law he might be handed a draft memorandum and articles of association or prospectus and instructed to settle them. At least a whole day should be allowed for each such question and the candidate would be supplied at least with relevant statutes. In addition the candidate should be sent photostat copies of the actual papers in some case raising nice legal problems and asked to write an opinion at his leisure. Once again he would be questioned on this at a subsequent oral examination.

The advantages of such a scheme, if practicable, are sufficiently obvious. Time pressure would be reduced and the problems would equate far more closely to those met in practice and place less weight on mere memory. Moreover, the candidate would be discouraged from keeping his law in water-tight compartments, which is such a noticeable and pernicious result of our present system particularly where examinations are held at the end of each session so that the candidate can write-off and forget one year's work before proceeding to the next.[40] On the other hand, it would certainly mean that examinations would take longer and require a far more elaborate organisation. The question is whether such a scheme is possible.

So far as the universities are concerned, I can see no really serious difficulty. It would mean that during the final term of the three-year course virtually the whole of the students' time and a considerable portion of the teachers' would be taken up with examinations, but at present this term is largely devoted to 'swotting' and coaching for the examination so that their time would be at least as profitably employed. Some steps have already been taken towards supplying statutes in the examination room; this has been done for many years in certain papers at Cambridge and the practice is now being introduced in London. It may be objected that if only the relevant statutes are supplied it defeats one of its own objects, that of seeing if the candidate knows where to find his law. In fact, however, it is probably safe to assume

[40] In recognition of this evil and in an attempt to cure it, Chicago Law School have in fact introduced the use of problem questions somewhat on the lines suggested (see Katz, 4 Chi.L.R. p. 531 *et seq.*).

that a candidate in land law will at least know that he should turn to the Property Legislation of 1925 and a candidate in company law to the Companies Act, 1948; the important thing is to see if he can find his way about these Acts. The ideal would, of course, be to supply a complete set of statutes and law reports, but this is clearly impracticable.

For the professional examination, the papers answered in the examination room would not present any more difficulty than at present; each question would be more difficult to set and mark but there would be fewer of them. But an examination board or boards would have to be in constant session, setting and marking the questions to be answered at the candidate's leisure and carrying out the oral examinations. While numbers remain as high as at present some measure of decentralisation would probably be vital with separate boards for different parts of the country. Probably it would be advisable for each to have a permanent chairman, the remainder of the board consisting of teachers and practitioners representing both branches of the profession who would hold office for a short time only. Such an arrangement, coupled with the fact that teaching at the professional law school would be by practitioners, would compel the whole of the profession to take a much greater interest in legal education, and this, I cannot but think, would be a very good thing.

One objection which may be raised to these suggestions is that unless all questions were answered under supervision, cheating would become rampant and the work submitted would not be the examinee's unaided efforts and might indeed be undertaken for him by professional crammers. In my opinion, however, the effect would be quite the reverse; cheating would become virtually impossible and the menace of cramming be eradicated. None of the questions, whether those to be answered inside or without the examination room, would be of the type which can be 'spotted' in advance or for which it is possible to 'cram'. The candidate might, it is true, seek the assistance of others in answering the questions tackled at leisure. But why should he not? If he is wise, when he sets up in practice he will discuss his problems with his colleagues and it is no more cheating to pick another's brains in discussion than it is to refer to his writings. If, however, he should go further and present another's opinion as his own, he would be, not a cunning cheat, but a foolish plagiarist who would inevitably be detected when he was cross-examined on it at the oral examination.

Personnel Selection Tests.

This brings me to the final question under this head: can modern forms of personnel selection tests ever take the place of formal legal examinations or be used to supplement them? The answer, fairly

clearly, is that they can never completely supersede examinations. The most that is claimed for such tests is that they measure intellectual capacity and assess temperament; they do not determine knowledge, understanding or the actual possession of particular skills. In other words they cannot be used to decide whether a candidate is a good lawyer. On the other hand, they should be valuable in deciding whether he is capable of ever becoming a good lawyer; their function is somewhat similar to that of blood tests in determining paternity. This suggests that as a test for entry into the university or apprenticeship, use could be made of them as a supplement to orthodox examinations. Instead of accepting matriculation or its equivalent as the sole criterion, entrants might also be required to submit to a 'Stoke d'Abernon' test similar to that of the Services' Selection Boards. This should at least enable those to be weeded out who are unlikely ever to make good lawyers and guidance might be given to the others on the type of legal career best suited to them. To some extent an additional test is already imposed since, owing to the shortage of places at universities, most of them hold their own tests additional to matriculation, but none of these, so far as I know, attempts to determine special intellectual and temperamental fitness for admission to the law faculty. Similarly, the Law Society now interview each applicant prior to entry into articles, but, so far as I can ascertain, these interviews are of the old-fashioned type with questions such as 'what school did you attend?', 'what games do you play?' and 'what are your hobbies?' In other words, they are designed to ensure that the applicant is a gentleman, rather than a potential lawyer. No one would deny that a lawyer is the better for being a gentleman, and it is arguable that he cannot be a good lawyer without being a gentleman, but what cannot be argued is that every gentleman is capable of being a good lawyer. Hence, the present type of interview is at best inadequate and at worst capable of abuse for the maintenance of class distinctions. If I may borrow an analogy from the army, we are at present at the early O.C.T.U. Board stage; it is time we moved on to W.O.S.B.'s. If a professional law school is established with the primary purpose of providing evening teaching, there seems no reason why it should not be used in the daytime as a centre for these preliminary tests.

VI. Selection and Status of Teachers

Practitioners v. *Teachers.*

There is in this country a wide gulf between the practising and the academic sides of the profession. To some extent this is inevitable; university law teaching is now a whole-time job and it is virtually impossible to combine it with practice. It is still possible to be primarily a teacher but to do a small amount of

part-time practice, or to be primarily a practitioner and to do a small amount of part-time teaching (I have suggested that this should be the normal position at a professional law school). Moreover, there is no reason, in theory, why there should not be a constant interchange between the teaching and the practising sides, and in U.S.A. this is a common occurrence. But in England this does not happen except very rarely; the gulf separating the two sides is not only wide, it is unbridged. The consequences might not be serious if the two sides were regarded as of equal status; but they are not; the academic side is very definitely regarded as on a lower plane and to a practitioner academic distinction is not a professional asset but a liability to be concealed at all cost. No professor as such [41] has ever been 'elevated' to the High Court bench, no judge has ever 'descended' from the Bench to a professional chair, and nothing is more nauseating than the patronising air of mock humility usually affected by one of His Majesty's judges when addressing an academic gathering. A psychiatrist will doubtless diagnose from these remarks that I am suffering from an inferiority complex. Precisely. It is my submission that English teachers of law suffer from an acute inferiority complex and that this is a bad thing for the profession as a whole.

Very different is the position in America. There the dividing line between teachers and practitioners is much less clearly defined and a constant interchange takes place between the two sides. Translation from an academic chair to the judicial bench (or *vice versa*) is quite common and a considerable proportion of the Federal Supreme Court has been so recruited. Hence, as Professor Laski [42] says, 'The professor of law in a faculty with a high standing in the profession is a man held in high esteem; even his favourite pupils are sought after. Judges will eagerly canvass his opinion of their decisions; they are not unlikely themselves to write against him in defence of themselves. . . . As a result no one who knows the dozen or so major law schools can really doubt that they are far more alive, far more able to elicit eager interest from their students, far more likely to be engaged in significant research, than all the English law schools put together'. These are hard words, but I am afraid that they are true.

In so far as practitioners are to blame for the present unhealthy position, there are signs that they are beginning to display a juster appreciation of the teacher's role. The recent addresses delivered by judges to the Society of Public Teachers of Law have not displayed the patronising attitude to which I have referred and the

[41] Blackstone was appointed in his capacity of practitioner and M.P. rather than as a professor and writer.

[42] *The American Democracy*, p. 371. It must be emphasised that these remarks only apply to the major American schools; there are a great many inferior ones.

speech of Lord Justice Denning at the last meeting was a remarkable and encouraging tribute to the value of academic studies.[43] If practitioners were more closely associated with teaching and examining on the lines which I have suggested it might be expected that this would help still further. But the fault is not all on the side of the practitioners; if our teachers do not deserve the good-natured contempt in which practitioners hold them, it must be confessed that on the whole their stature is not comparable with that of the leaders of the Bench, Bar and solicitors and that we have produced few, if any, really great teachers—great, that is to say, not as scholars but as teachers. The vital need, therefore, is to improve their quality and the question is how this is to be done.

Selection of Teachers.

I believe that there is nothing fundamentally unsound in our methods of selecting teachers. In contrast with Continental practice, we do not over-emphasise the importance of published work but place some value on practical experience and more on teaching ability (students are apt to doubt this, but such is the case). I should not have thought that it was necessary to argue that we are right so to do but I was startled to observe that as recently as 1933 the contrary view was expressed by Professor de Zulueta.[44] He conceded, somewhat reluctantly, that in some teaching posts practical experience might be valuable but regarded pedagogic ability as of little importance, fit only for an infants' school. 'In a university lecture room', he said, 'the essentials are to know your subject, to prepare your lecture conscientiously . . . and to speak up.' I could not disagree more. In my opinion the most important quality is to be interesting—knowledge and accuracy come second. The object of lectures is not to display the teacher's learning but to encourage the student to learn and it is no bad thing if he shocks them into life by an occasional heresy or even 'howler'—an interested class will soon correct them.[45]

The Status of Teachers.

I therefore consider that our selection tests are those best adapted to secure the best recruits from those applying, and if we do not get the best teachers it is because the best do not apply or do not remain long on the teaching side. In truth it is mainly for the latter reason. Owing to the fact that practitioners are

[43] But he subsequently discovered that it was still unsafe to quote academic authority for his judgments (see *Hopes* v. *Hopes* [1949] P. 227 at p. 238 (C.A.) and *Wheatley* v. *Wheatley* [1949] 2 All E.R. 428).

[44] (1934) J.S.P.T.L. p. 1.

[45] Most of us find no difficulty in making sufficient mistakes accidently but if we ever attain perfection there is something to be said for introducing 'this week's deliberate mistake' in order to keep the class on the *qui vive*.

ill-remunerated in the early days there is no particular difficulty in initially attracting the best young men; an Assistant Lectureship at £450 per annum is just what a newly called barrister needs in order to tide him over until he can build up a practice. But once he has found his feet he drops teaching and devotes himself to a pursuit of the more glittering prizes offered by the Bar. This is not solely, or perhaps mainly, for purely mercenary considerations (on the whole the best teachers are those who are not particularly interested in making money) but because of the lower status of the teaching side reflected in the lower remuneration. The annual salary of a Law Lord is £6,000, of a Supreme Court judge £5,000, of a county court judge or a metropolitan police magistrate £2,000, and the county court judge is paid as a High Court judge while sitting as a Divorce Commissioner. These judicial salaries are to be increased. A leading barrister or solicitor can earn considerably more than the highest of these. The basic salary of a university professor has just been increased to £1,600.[46] From these scales it is easy to see what view the profession take of the place of teachers in the professional hierarchy.

Academic Salaries.

These inadequate salaries are of course in line with academic salaries generally and law teachers display an understandable reluctance to suggest that their salaries should be increased above those of their colleagues. Nevertheless, and at the risk of being thought wanting in delicacy, I venture to suggest that their position is not wholly comparable with that in other faculties. Not only can they earn more in practice (which alone has been thought to justify increasing the salaries of teachers in medicine) but they have fewer opportunities of substantially supplementing their incomes from the sales of their books. A work on economics, political science, sociology, history, literature, or the physical sciences, may become a best seller and earn large royalties, but nobody has made a fortune out of a law book.[47]

It is therefore submitted that a substantial increase in law teachers' salaries is essential if the status of the academic side is to receive due recognition, and that there is justification for such an increase even if it means introducing a disparity with other academic salaries. I fully appreciate that this is a most unfavourable time to put forward further 'wage claims' and that in view of the increases recently authorised there is no immediate prospect of their being granted. Nevertheless I think it vital to emphasise here and now that legal education is important to the whole

[46] There are admittedly supplements which vary from university to university, but a law professor has little hope of overtaking a county court judge.

[47] The largest royalties in recent years were probably earned by a 'Penguin Special'—but this was written by a practitioner.

profession, that its quality depends on the teachers and that the quality of the teachers depends on adequate recognition of the value of their services. Professor Simpson has recently told us [48] that this has been recognised in America, where a committee has recommended that the salary of a senior law teacher should be at least equal to that of a federal circuit judge. Unfortunately the English professional bodies have never thought it their business to interest themselves in law teachers' salaries. They have, at times, boasted of being 'efficient trade unions' [49] and have intervened to secure adequate salaries for legal civil servants. But teachers have not been thought worthy of consideration. The British Medical Association have taken a different view, with consequences which we have seen.

Professional Recognition.

Another step which might be taken to improve the standing of the academic side is for the grant of silk to distinguished teachers to be made regular and ordinary instead of extraordinary and irregular. If the honour of becoming a K.C. were known to be as readily available to those who decided to devote themselves to teaching as to those who practised at the Bar this would automatically do much to improve the status of the teaching side. Similarly no teacher has ever been elected to the Council of the Law Society [50] and although the number of teachers who are or remain solicitors is comparatively small it is for consideration whether means could not be found for securing their representation on the Council where their knowledge of educational matters would be of value apart altogether from the resulting increase in teachers' prestige.

Teaching at the Professional School.

The provision of teachers for a professional law school of the type suggested would of course raise new problems. For reasons already stated I regard it as vital that the teaching should be by those who are primarily practitioners, but this of course does not mean that every practitioner, however distinguished, would necessarily be a suitable teacher at the school. On the contrary great care would have to be taken in their selection so as to ensure that they not only knew their subject but knew how to put it across. Happily an experienced lawyer is almost bound to have acquired

[48] At the 1949 meeting of the S.P.T.L. (1 J.S.P.T.L.(N.S.) 256). The Report to which Prof. Simpson referred has now been published *sub nom. Legal Education and Admissions to the Bar in California* (Los Angeles, 1949).

[49] Speech of President at Law Society's Special General Meeting, January, 1946 (43 *Law Society's Gazette*, p. 36). The Law Society have also given a lead by offering salaries to the teachers of their School of Law on a higher scale than that applicable to university teachers in comparable posts.

[50] The late Dr. Leslie Burgin was elected after he gave up teaching.

this ability to some extent. Moreover the task of the teacher at the professional school would be somewhat easier than that of the university don since he would be discussing practical problems of the type familiar both to him and to his audience and therefore not so difficult to make interesting as the more abstract problems discussed at the university.

VII. Continuing Legal Education

By the expression 'continuing legal education' I do not mean advanced research. That is of course of great importance and it is one of the gravest slurs on our profession that neither barristers nor solicitors have ever had any organised study activities. But such activities are a consequence of legal training rather than part of it and therefore fall outside the scope of this paper. In any case in the Institute of Advanced Legal Studies we now have an instrument for use in connection with such studies and all that is needed in addition is an awakened professional interest such as might be expected to result from an improved legal education.

What I have in mind are arrangements for enabling practitioners to keep their law up to date. At present we go to some pains to test, however inadequately, the qualifications of lawyers on their original entry into the profession, but we do nothing to ensure that they remain qualified thereafter and very little to help them to be so. But if it is not easy to become a good lawyer it is equally difficult to remain one. Once again we lag behind the U.S.A., where national and local arrangements for continuing legal training have been in operation for several years, formerly co-ordinated by the Practising Law Institute and now by the Committee of the American Law Institute collaborating with the American Bar Association. The handbook of this Committee published in 1949 surveys what has already been done under this head and what is in preparation for the future.

In England tentative moves in this direction have been made by the Law Society, which organised a series of refresher courses for solicitors returning to practice after the war and which has since provided and published lectures on recent developments and new legislation. The Bar does not seem to have done anything at all. The need for further extension is sufficiently obvious, and that practitioners would welcome it is shown by the fact that such lectures as the Law Society have organised have been over-subscribed. I have already suggested that the Professional Law School should run optional diploma courses in special subjects which practitioners could take after qualifying, thus enabling them to extend the ambit of their knowledge. I further suggest that in addition the School should run special refresher courses to enable them to keep their existing knowledge up to date. While I would not recommend subjecting them to further examination tests it would, I think, be

reasonable that the Law Society should make it a condition of renewal of a practising certificate that such a course is taken, say, every five years and that the Bar Council should institute a similar rule. By arrangement with the local Law Society and Bar these courses could be held in the major provincial centres as well as in London.

Another desirable innovation would be an annual or bi-annual conference under the auspices of the Bench, Bar and solicitors to consider the state of the law in various sections. Not only would this be of educational value but it would also direct attention to the matters most in need of reform. At present the solicitors do consider certain topics of general legal interest particularly at the provincial meetings of the Law Society, but meetings of the Bar Council only consider matters of professional organisation and remuneration. Up to the present the only conferences at all comparable with these suggested have been the two Anglo-French Legal Conferences, for which the Law Society was largely responsible, and the meetings of the International Bar Association. Both these have embraced lawyers of all branches and functioned through various committees, each considering different branches of the law. It seems strange that the traditionally insular Englishman should be more eager to discuss his problems with foreigners than with his own colleagues; it is noticeable that both these are post-war developments and it may not be over-cynical to suggest that the present difficulties attending individually arranged foreign travel account in some part for this eagerness. Be that as it may, a comparative and international approach to these problems is all to the good, but it should be additional to, and not in substitution for, discussions at home.

VIII. Conclusions

I therefore answer my original question by saying that all is far from well with English legal education and training. I do not expect that everyone will agree with my diagnosis of our ills and it is unlikely that anyone will agree with all my cures. But I do claim to have established a case for inquiry. The progress made in the last 100 years, though considerable, has been disappointingly short of that needed if we are adequately to face the requirements of today—let alone of tomorrow. In 1846 the Legal Education Committee reported that ' the present state of legal education is extremely unsatisfactory and incomplete and in striking contrast and inferiority to such education in all the more civilised States of Europe and America '; in 1948 Professor Laski could say very much the same. In the intervening period there has been an immense growth of teaching but the professional bodies continue to rely on examination tests of doubtful value rather than upon compulsory and supervised training. Arrangements for the Bar still lag far

behind those for solicitors but neither branch has yet succeeded in securing an adequate balance between theoretical and practical instruction and both retain anachronistic financial barriers to admission. Sensible co-ordination between the arrangements of the two branches, and between them and the universities, seems as far off as ever, with wasteful results. And our teachers, handicapped by a sense of professional inferiority and by unintelligent examination requirements, are unable or unwilling to keep abreast of modern developments and to experiment with new teaching methods.

If then an inquiry is called for, what form should it take? I personally would like to see it undertaken by the profession and not imposed upon us from outside, but unhappily there is little sign of the requisite professional interest in or awareness of the problems involved. The traditional apathy of lawyers towards law reform is apt to become a positive antipathy when any reform of their professional organisation is involved.[51] A further difficulty is that, in contrast with America, we have no professional body representing the profession as a whole which might carry out the investigation.[52] If the Advisory Committee recommended by the Atkin Report had ever been set up this might have proved a satisfactory body, but it is useless for the Bar Council or Council of Legal Education, the Law Society, and the universities each to attempt to tackle it in isolation. Nor has the Society of Public Teachers of Law the necessary power or status. On the other hand we now have a Standing Joint Committee of the Bar Council and the Council of the Law Society and if this could get together with the S.P.T.L. a satisfactory committee of inquiry might be appointed. It seems regrettable if a profession which has been largely responsible for the new Legal Aid Scheme cannot tackle the problem of their own education. As we have seen, the American and Canadian Bar Associations are carrying out surveys of a much more elaborate kind and it is arguable that a similar inquiry is necessary in this country; that it would be valuable I cannot doubt, but equally I am convinced that something much less elaborate and expensive would meet the immediate need.

If, as I fear, the profession are not prepared to put their own house in order, then it is submitted that there is an overwhelming case for a further Royal Commission or Departmental Committee. It must be confessed that our recent experiences of such inquiries in this field have not been very encouraging, but I cannot believe that this need be so, particularly if their terms of reference were framed sufficiently widely on the lines of those of 1846 and 1854.

[51] It is a vicious circle. We shall never get lawyers interested in law reform until we reform legal education, but that is the last type of law reform likely to interest them.

[52] What such a professionally sponsored inquiry might accomplish is shown by the Report of the Survey Board on Californian Legal Education, referred to *supra*, p. 201, n. 48.

But a single ad hoc inquiry, even if its recommendations are carried out, can never be a complete solution to the problem. Legal education must become *and remain* a live question. To accomplish this increased activity will be essential on the part of both professional bodies and the Society of Public Teachers of Law and greater collaboration between all three. Legal education is a particularly useful field of activity for the new willingness of English lawyers to discuss their problems internationally. Visits of distinguished teachers of the common law from the Dominions and U.S.A. should be encouraged and there should be an increased exchange of views with Scottish, Irish and Continental teachers. Periodical conferences with them should be held to discuss methods of legal education. Additional powers should be conferred upon the S.P.T.L. and further duties should be undertaken by it. It should publish an annual 'Guide to the Study of the Law' giving factual accounts of the institutions concerned in the teaching of law and this should include and not ignore the professional coaching establishments and other non-university institutions. It should also consider conferring 'approval' on such institutions, whether university or otherwise (as its American analogue does), so that bad schools would be black-listed. It might also be well, particularly if a compulsory law degree is introduced, if the Society's committee included representatives of the Bar Council and the Council of the Law Society and not merely of the Inns of Court and Law Society's School. It should also concern itself far more than it does with the conditions and remuneration of the teaching side and become something in the nature of the law-teachers' trade union; owing to our divided profession this cannot safely be left to the professional bodies, each of which is concerned only with members of its own branch. It is also for consideration whether the ambit of the Society should not be widened so that all law teachers (and not merely 'public' teachers) are eligible for membership. At present the coaches attract more students than any law school and it is doubtful whether the Society minimises their dangers by emulating the ostrich. If any scheme on the lines of my proposals were introduced I believe that the powers of the crammers would be much reduced, but no country has succeeded in eradicating them completely [53] and it is too much to hope that we should ever succeed—even if we wished to try.

The vital need therefore is to awaken interest in this country in the problems of legal education and training, and that must be the excuse for this monograph.

L. C. B. Gower.*

[53] In America, many so-called universities are in fact cramming establishments run for private profit.

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NAZI SPOLIATION IN CZECHOSLOVAKIA

THE discussion of a decision of the House of Lords performs a useful function only if the reviewer constantly bears in mind that no appeal lies to a Law Review, and that, therefore, he must primarily regard it as his task to ascertain the extent to which the House of Lords has actually stated the law, how far the decision rests on its peculiar facts and what attitude future generations are likely to adopt towards it. From this point of view the recent decision of the House of Lords in *Kahler* v. *Midland Bank, Ltd.* [1950] A.C. 24, and its companion decision, *Zivnostenska Banka* v. *Frankman* [1950] A.C. 57, present great difficulties.

The plaintiff in the former case was the undisputed owner of bearer securities deposited with the defendant bank and originally held by it for the Zivnostenska Bank who were the plaintiff's bankers in Prague and with whom he stood in the ordinary relationship of banker and customer. Towards the middle of March, 1939, the Germans occupied Prague. The plaintiff, 'who is of Jewish race, became a victim of their persecutions',[1] and 'the price of exile that was extorted from him was the transfer of all the securities that he possessed to the Bohemian Bank',[2] who, in the defendant's words, were 'then under the control or domination of the Germans and themselves held the said shares to an account called "Vermögensamt" for the German authorities'.[3] This was brought about by a written agreement of March 29, 1939, between the plaintiff and the Bohemian Bank. On April 1, 1939, the plaintiff left Czechoslovakia and went to France. On April 17, 1939, the Zivnostenska Bank requested the defendants to hold the plaintiff's securities in future for the Bohemian Bank, and added: 'This transfer is made by order and for account of the owner of these shares, Mr. Victor Kahler. . . . The ownership of the above shares remains unchanged'. On May 11, 1939, the defendants acknowledged receipt stating: 'Owner: Mr. Victor Kahler'. On July 26, 1939, the plaintiff wrote to Zivnostenska Bank determining their authority to hold his securities and sent a copy to the defendants. On July 28, 1939, he issued a writ against them for possession. Their main defence was that Czechoslovakian exchange restrictions made it illegal for their bailors, the Bohemian Bank, to release the securities to the plaintiff.

In November, 1948, the decision of the Court of Appeal which had dismissed the action and whose decision was reviewed at (1948)

[1] At p. 30, *per* Lord Normand.
[2] At p. 54, *per* Lord Radcliffe.
[3] Paragraph 11 of the defendants' Case in the Record.

11 Mod.L.R. 479, was affirmed by a majority of the House of Lords (Lords Simonds, Normand and Radcliffe), Lords MacDermott and Reid dissenting.

It is impossible to believe that there are many to whom the result, as justified by the House of Lords, will appeal, whose sense of justice will be satisfied by it. Lord Radcliffe (at p. 52) admitted as much when he said that it was 'an anomalous set of circumstances when the person who is the sole beneficial owner of property cannot obtain the aid of the law to recover its possession'. The existence of this anomaly adds colour to the accidents to which this action was exposed. Would the result have been the same if the action had been finally decided in July, 1939, when the United Kingdom had not yet introduced a system of exchange control, but still regarded it as vital to maintain its reputation as a banking centre and to justify the confidence of foreign investors? Or if the action had been decided in July, 1944, when the full vigour and rage of Nazi spoliation was, as it seemed, indelibly impressed upon our minds, when the lawful Government of Czechoslovakia was in London and tried to mobilise its nationals' resources for the common cause, when the freeing of Czechoslovakian assets from German control was a matter of public policy? Or if the defendant bank had availed itself of its right to join the Bohemian Bank,—a step which, on the clear authority of *Wilson* v. *Anderton* (1830) 1 B. & Ad. 450, the plaintiff could dispense with, but which, for inexplicable reasons, Lord Simonds (at p. 26) and Lord Normand (at p. 34) apparently required him to take?

These are matters which emphasise the fortuitousness of litigation, but which cannot now affect the implications of the decision that the highest tribunal has rendered. They include numerous dicta of interest, but the following discussion must be confined to the essentials.

The first point which the decision establishes is the rule of English municipal law that, if the owner of a chattel, by an action in detinue, claims possession from a bailee who holds it under a contract of bailment made with a bailor other than the owner, the bailee 'is entitled to demand proof that [the owner] is entitled to immediate possession' (at p. 34 *per* Lord Normand, at p. 56 *per* Lord Radcliffe). Perhaps there are some who would have expected the rule to be that recognised in several other legal systems, *viz.*, that once the owner has proved ownership, it is for the defendant bailee to prove that he or his bailor has the right to immediate possession. The English rule as now propounded by the House of Lords puts on the plaintiff-owner the burden to prove that he is entitled to possession, it being irrelevant that the defendant's bailor is not entitled to possession. It remains to be seen whether at some future date the courts will feel compelled to qualify the rule or whether, on the contrary, they will apply it literally and hold that, if A hires his

car to B for a period of one year and the car is stolen from B and then comes into the hands of C who deposits it with D, A cannot recover it from D, because the right to immediate possession is vested in B. Although it is settled that an action in trover or detinue does not lie, if the plaintiff is not entitled to possession, the particular distribution of the burden of proof countenanced by the House of Lords does not seem to have been suggested by any previous decision.

Apart from the question of burden of proof, it is submitted that the logical order of the problems to be decided in this case was as follows :

(1) Was the plaintiff's right to possession determined by the proper law of his contract, if any, with the head-bailee ?
(2) If so, was there in fact any contract between the plaintiff and the Bohemian Bank which could defeat his right to possession ?
(3) If so, was the contract subject to Czechoslovakian law ?
(4) If so, was the plaintiff by Czechoslovakian law in fact precluded from obtaining possession ?
(5) If so, was the effect of Czechoslovakian law capable of recognition in England ?

All these five questions were answered in the affirmative by the majority of the House of Lords.

1. The House must be taken to have established the principle that, as a matter of English private international law, it depends on the proper law of the contract between the owner and the head-bailee whether the former has such right to immediate possession against the latter as to impose a duty upon the defendant sub-bailee to surrender the chattel, and this is so even where the lex situs and the lex causæ (the proper law of the contract) differ.

This rule, as extended by the last few words, is perhaps not an obvious one and it may well be regarded as surprising that it was laid down by the House of Lords without even a word of reference to that legal system which, in connection with rights to possession, one would least expect to be ignored : the lex rei sitæ. Yet there is probably no reason to quarrel with the proposition. Its application or adaptation, however, to other cases of possessory rights, particularly to cases of liens or pledges, remains a matter of speculation. Altogether this is a field which, apart from the short discussion by Dean Falconbridge, *Conflict of Laws*, pp. 400, 401, has been greatly neglected, but merits thorough monographic study. This must include a definition of the lex situs; from the English point of view the situs may well appear to be both the place where the sub-bailee exercises custody over the chattel, and the place where, according to such cases as *Dollfus Mieg et Cie* v. *Bank of England* [1949] 1 Ch. 369, 387–389, the head-bailee is in (constructive) possession. If and in so far as the situs is relevant at all, it

may also have to be considered whether in certain circumstances the existence or creation of a right to possession should not be dependent upon the cumulative effect of the lex (or leges) situs and the lex causæ. Moreover, it will be necessary to inquire into the effects of the doctrine of renvoi; for instance, the Czechoslovakian Act on Private International Law of March 11, 1948 (sections 36, 37—see *Journal of Comparative Legislation*, 3rd series, XXXI, 78), may mean that the question which the House of Lords submitted to the law of the contract would now be governed by English law *qua* lex situs. A detailed discussion of these and similar matters, however, is beyond the scope of these observations.

2. On the basis adopted by the House of Lords the plaintiff's right to possession could obviously be defeated only as a result of a contract made with the Bohemian Bank as head-bailee. Such a contract could be found only in the agreement of March 29, 1939. It is, however, one of the most puzzling features of this case that none of the Law Lords relied on this agreement; indeed the defendants admitted and Lord Normand (at p. 30) and Lord Reid (at pp. 45, 49) held that, as it 'was signed under duress, it is not binding' on the plaintiff, that it was 'void as having been obtained under duress'. (Incidentally, since duress makes an agreement voidable only, it must be assumed that the plaintiff was held to have avoided it, probably by sending to the defendants, as agents of the Bohemian Bank, a copy of the letter of July 26, 1939, addressed to Zivnostenska Bank.) And even if the agreement had not been void on the ground of duress, it cannot be open to doubt that it became abrogated as a result of the outbreak of war on September 3, 1939, when Czechoslovakia became enemy territory: see the line of cases represented by *Ertel Bieber* v. *Rio Tinto Co.* [1918] A.C. 260.

It was, however, held by Lords Simonds, Normand and Radcliffe (at pp. 26, 34, 54) that the plaintiff ratified the letter of April 17, 1939, written by the Zivnostenska Bank and thus committed himself to the view that the transfer to the Bohemian Bank was a valid and proper transaction; this was said to follow from an amendment of the plaintiff's statement of claim by which he relied on that letter to establish a contract between himself and the defendants direct—a contention which the House summarily dismissed. It is difficult to follow this reasoning: if, as between himself and the Zivnostenska Bank, the plaintiff must be taken to have authorised the transfer to the Bohemian Bank, this cannot create or validate a contract between himself and the Bohemian Bank. With great respect, there also is almost irresistible force in the observation of Lord Reid (at p. 50):

> Still less can I see how he must be held to have admitted that the void agreement must for the purposes of this case be treated as a subsisting contract and, as I have said, this was

> not argued. It was argued, somewhat faintly I thought, that the appellant had, in effect, adopted that part of the void agreement which authorised the Bohemian Bank to hold the shares. Subsequent partial adoption of a void contract I find to be a difficult conception which I cannot accept as applicable.

No evidence on the existence of the contract was given by the only Czechoslovakian expert called by the defendants. Indeed, neither party had pleaded that the contract, if any, was subject to Czechoslovakian law except that according to the defendants' pleading the 'plaintiff by transferring the said shares into a depot with the defendants of the Bohemian Bank submitted himself according to Czechoslovakian law to all the provisions . . . of the financial and monetary regulations of Czechoslovakia'. It must be assumed, therefore, that the House reached its conclusions on the basis of English law. But in the absence of any pertinent discussion it is impossible to make the further assumption that the House intended to treat validity and ratification as matters which are always governed by English law, notwithstanding the fact that the proper law of the alleged contract is foreign.

3. If there was a contract with the Bohemian Bank and if the applicability of Czechoslovakian law could be taken to have been sufficiently pleaded, it became essential to ascertain whether the contract was subject to English or Czechoslovakian law. It is here that, owing to the curious absence of evidence, there arose that artificiality which characterises the reasoning of all the Law Lords and of which some of them complained in eloquent terms.

Lord Simonds (at pp. 27, 28), Lord Normand (at p. 35) and also Lord Radcliffe (at pp. 54, 55) held that the plaintiff's contract with the Bohemian Bank must necessarily have been subject to the same law as that which governed his original contract with the Zivnostenska Bank and that the latter was the law of Czechoslovakia. This reasoning, of course, rests upon the facts of the case and does not involve any general principle. It would perhaps not have been accepted by Lawrence J. (as he then was) who in *Banco de Vizcaya* v. *Don Alfonso* [1935] 1 K.B. 140, 145, was inclined to reach the opposite result. It includes some special pleading which had to serve as a substitute for evidence and is explained by the 'many suppositions and hypotheses' (*per* Lord Reid at p. 52) that had to be made. Future generations will not fail to read it in its very narrow context.

It should, however, be pointed out that the reasoning of the majority shows a complete disregard for the presumptions to which resort has been had in the past when similar uncertainties arose, and which, in the present case, might well have led to the application of English law as the lex loci solutionis and the lex situs. The other point which requires emphasis is the equally complete disregard for the political situation prevailing in Czechoslovakia in

1938–9. The majority in effect treated those contracting on behalf of the Czechoslovakian bank as quislings in that it overlooked the fact that they may well have preferred to submit the contract to a legal system other than that of Czechoslovakia for the very purpose of enabling the plaintiff to extract his property from German control.

4. If the law of Czechoslovakia was applicable, the decisive question arose whether, by its provisions, the plaintiff was entitled to immediate possession. It is clear, as Lord Radcliffe stated (at p. 53), ' that, so far as the contract of bailment was concerned, the appellant could properly be said to have the right to recover immediate possession from the bank '. Indeed, that contract had come to an end in consequence of the plaintiff's letter of July 26, 1939. What, then, was it that stood in the way of the plaintiff recovering his property? It was nothing else than the fact that under Czechoslovakian exchange restrictions the Bohemian Bank required the National Bank's licence before it could consent to a release.

It would probably have been impossible to argue that, the contract of bailment having come to an end and a demand for delivery having been made, the proper law of the contract no longer had the power of conferring a right to possession on the ex-bailee. What would, however, seem to have been open to very serious argument was the question whether in truth and in fact Czechoslovakian law did grant a right to immediate possession to the Bohemian Bank; for this must be the inevitable consequence of a denial of the plaintiff's right to possession: if he does not have it, the Bohemian Bank must have it. Lord Radcliffe was indeed logical in concluding (p. 57) that the House was bound ' to treat the appellant as having ceded the lawful possession of his shares for an existing, though indeterminate, period and to hold him accordingly disentitled to the relief he claims '.

The provisions of Czechoslovakian law, making it unlawful and punishable for the Bohemian Bank to transfer the securities to the plaintiff, created an impossibility of performing the contract by re-delivery. But, apart from this purely contractual effect, did they create a right to possession? This is, of course, primarily a question of Czechoslovakian law, on which no evidence was called. As a matter of principle the answer ought to be in the negative. The point can be tested by assuming that the defendant Midland Bank had released the securities to the plaintiff. Could the Bohemian Bank which, as was admitted, had no claim to or lien upon the shares, have recovered possession from him? So to hold would make a curious result clearly preposterous. That export restrictions do not give a right to possession is well illustrated by the decision in *King of Italy* v. *De Medici* (1918) 34 T.L.R. 623. The King of Italy claimed possession of certain works of art which

were not his property but which had been exported from Italy and brought to this country without such consent as was required by Italian law. On an application for interlocutory relief Peterson J. held that the plaintiff had failed to show a cause of action.

5. If by the law of Czechoslovakia the Bohemian Bank acquired a right to possession, the question arose whether it was capable of recognition or enforcement in England. The House of Lords negatived the suggestion that this was penal or revenue legislation to which no effect could be given here; it did not refer to *Banco de Vizcaya* v. *Don Alfonso*, *ubi supra*, which, in relation to the events of 1939, is by no means without bearing upon the present case. Without giving any reasons, however, the House also held that no confiscation of assets situate outside Czechoslovakia was involved. A reviewer who previously ventured to express a different view, while not required to recant, must respectfully bow to the verdict of the supreme tribunal. But he cannot help adding that the realities of the case, which are to be found in the Bohemian Bank being allowed to assert a right of the National Bank of Czechoslovakia, tend to bring it within the ambit of the decision of the Court of Appeal in *De Borbon* v. *Westminster Bank* (1933) 49 T.L.R. 414.

Whatever view may be taken of the matters discussed in this note, the result reached by the House of Lords may perhaps be justified by article 5 of the Monetary Agreement between the United Kingdom and Czechoslovakia of November 1, 1945 (Cmd. 6694), by which the contracting governments undertook to 'co-operate with a view to assisting each other in keeping capital transactions within the scope of their respective policies and in particular with a view to preventing transfers between their areas which do not serve direct and useful economic or commercial purposes'. With the elaboration of this point the present comments, already unduly long, cannot be burdened. It will follow in an article in the *British Yearbook of International Law*, 1949.

F. A. Mann.*

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CONTRIBUTORY NEGLIGENCE: THE SECOND PLAINTIFF

WHAT is the position of a second plaintiff—husband, master or parent—suing for damages arising out of an act of negligence committed against the first plaintiff—wife, servant or child—who has been guilty of contributory negligence?

In *Mallett* v. *Dunn* [1949] 2 K.B. 180 a married woman was injured through the negligence of the defendant. In an action for damages brought by her and her husband she was found guilty of some contributory negligence and the damages awarded to her were, accordingly, reduced under the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1). In respect of the special damages claimed by the husband for medical and household expenses, Hilbery J. held that the husband's cause of action was personal to him and distinct from the claim made by his wife, and it was not defeated by the fact that she was guilty of contributory negligence; as the contributory negligence was the fault of the wife and the husband had not been at fault in making his own claim in respect of the damage which he had suffered the husband was not a person who had suffered damage 'as the result partly of his own fault' within the meaning of the Act of 1945; and therefore he was entitled to recover in full the damages claimed.

Similar questions have been decided in the opposite way in Canada. In *Knowlton* v. *Hydro Electric Power Commission of Ontario* (1925) 58 O.L.R. 80—a case in the High Court of Ontario—a wife and her husband sued in respect of an injury done to her by the defendants' negligence. The wife was held to be guilty of contributory negligence, and her damages *and those of her husband* were reduced under the Contributory Negligence Act, 1924. The intricacies of that statute need not detain us, for the ground for the decision was stated to be that under the law as it stood before the passing of that Act the action of the husband must have suffered the same fate as an action by the wife brought at that time, that is, it must have been dismissed.

McKittrick v. *Byers* (1925) 58 O.L.R. 158, decided in the Court of Appeal for Ontario, reinforces this view. This was an action by an infant and her father to recover damages for her injury caused by the defendant's negligence. As the cause of action arose before the passing of the 1924 statute, the contributory negligence of the daughter was held to defeat her claim. It was further held that the father's claim was thereby defeated also.

Yachuk v. *Oliver Blais Co., Ltd.* [1949] A.C. 386 is a Canadian case which was recently before the Privy Council. Here a boy of

nine bought some petrol from a garage and then burnt himself with it. The case was tried before Urquhart J. in the High Court of Ontario [1944] 3 D.L.R. 615. The learned judge found the garage, through their servant, guilty of negligence in supplying the petrol, and the boy guilty of contributory negligence. He held the boy to be 75 per cent. to blame. He thereupon reduced the damages of both the boy and of his father—suing for medical expenses—to one quarter. The Court of Appeal for Ontario held that the boy was not guilty of contributory negligence and, therefore, that he and his father were entitled to damages in full. In the Supreme Court of Canada [1946] S.C.R. 1, the five judges disagreed. Two of the judges held that the defendant garage were not negligent and that therefore the action should be dismissed. Three judges held that the garage were negligent; and, of these, one held that the boy was not guilty of contributory negligence, and was therefore entitled to damages in full, and two (Hudson and Estey JJ.) held that the boy was contributorily negligent and that his damages *and those of his father* should be reduced. In the result, an order was made restoring the decision of the trial judge, so that, in effect, the views of the two last-mentioned judges prevailed. The appeal to the Privy Council does not touch this point, for the Board held the boy not to be contributorily negligent. It was therefore unnecessary for the Board to consider what would have been the quantum of damages had there been contributory negligence by the boy. So here is a decision of the Supreme Court of Canada that the second plaintiff should suffer diminution of damages in the event of the first plaintiff being found guilty of contributory negligence. Here, again, although the construction of the relevant statute, the Negligence Act, R. S. O., 1937, c. 115, s. 2 (1) is discussed, the foundation of the decision is that at common law the father's claim would have been defeated by the contributory negligence of the child. And this, in turn, was explained thus by Estey J. [1946] S.C.R. at p. 17: 'While the father was in no way associated with the events that inflicted the injury suffered by the infant plaintiff, it must not be overlooked that, although a separate and distinct cause of action, his has been regarded as a consequential or dependant action and treated upon much the same basis as the infant'.

Att.-Gen. of Canada v. *Jackson* [1946] S.C.R. 489 is another decision of the Supreme Court of Canada bearing on this principle. One D, a Canadian serviceman, *being on leave of absence*, was travelling to his home as a guest passenger in the respondent's motor car. Section 52 of the Motor Vehicle Act (N.B. 1934, c. 20) negatives any right of action against the owner or driver of a motor car for loss or damage resulting from injury to, or death of, a gratuitous passenger. A collision occurred and D was seriously injured. The Crown sued for wages paid and medical services

rendered during D's incapacitation. Held: The Crown, while bearing the relation of master towards a serviceman, has no direct or specific right of recovery against a third person for expenses incurred through injury caused by the latter to the serviceman; such right depends on whether the serviceman himself has any right of action arising from the act of the third person. Hence, where D, being a gratuitous passenger in the respondent's automobile at the time of his injury, could bring no action against the respondent, neither can the Crown.

These four Canadian cases all proceed on the same basis, namely, that the action of the second plaintiff is, as Estey J. puts it, 'a consequential or dependent action', and that (to quote Kellock J. [1946] S.C.R. at p. 498): 'Accordingly, if the defendant's conduct does not constitute a tort against the servant, the master has no cause of action'. Applied to this particular point of contributory negligence the argument is that at common law the contributory negligence of the servant (or wife or child) would defeat the second plaintiff's claim altogether, and that the most he can recover now is damages reduced in the same proportion as are those of the first plaintiff.

These Canadian cases cite a number of authorities both American and English.

Grant J., in his judgment in *Knowlton's Case* (*supra*), cites an American case of *Winner* v. *Oakland Township* (1893) 148 Penn.St. 405. In that case, the wife having been found guilty of contributory negligence, the court held that the husband could not recover consequential damages in respect of her injuries.

The judgment of the court in *McKittrick's Case* (*supra*) cites three American cases:—

(a) *Chicago and G.E. Ry.* v. *Harney* (1867) 28 Ind. 28. A minor was hired by his father to the railway company and was injured by the negligence of the company. The court held that if the injury was caused by the boy's own negligence along with that of the company the father could not succeed.

(b) *Kennard* v. *Burton* (1845) 25 Mc. 39. Action by a father for injury to his infant daughter. The court held that if she contributed to cause the injury by her want of ordinary care, the father could not recover.

(c) *Burke* v. *Broadway and Seventh Avenue R.R. Co.* (1857) 34 How Pr. 239; 49 Barb. 529. Action by a father for injury to his infant son. Held, that contributory negligence of the boy defeats the father's claim. 'An injury received without reasonable prudence, on the part of the person injured, gives no right to recover amends in pecuniary damages. The father can recover only under the same circumstances of prudence [1] as would be required

[1] This is quoted as 'providence' in *McKittrick's Case* (p. 163).

if the action were on behalf of the boy'. Miller J., who dissented in part, concurred in this statement of the law.

The English cases which are cited are not so convincing. Four are cited in *McKittrick's Case* (*supra*).

(a) *Hall* v. *Hollander* (1825) 4 B. & C. 660. This case is cited only to show that a claim by a father is based on the notion of loss of service, so that it falls to be governed by the same principles as a claim by a master. *Hall* v. *Hollander* is interesting in two other respects, though these are not referred to in *McKittrick's Case*. A distinction is drawn between a claim for loss of service and a claim for expenses, but there seems to be no authority which suggests that the one is any more or less dependent than the other on the right of action of the child. Also in *Hall* v. *Hollander*, Abbott C.J. says: 'It is a principle of the common law that a master may maintain an action for a loss of service, sustained by the tortious act of another, whether the servant be a child or not'. Does the expression 'tortious act' refer to a tort by the defendant against the servant or against the master? In the view of the present writer it must mean a tort against the servant, because if it meant a tort against the master the dictum would be circular, amounting to a statement that the master may maintain an action for a loss of service if that loss of service amounts to a tort.

(b) *Chaplin* v. *Hawes* (1828) 3 C. & P. 554. 'Action for an injury done to a horse which the plaintiff's servant was riding, by a cart which the servant of the defendant was driving'. The argument was concerned with whose negligence caused the accident. The first sentence of the judgment of Best C.J. is the only part of it which touches our point: 'If the plaintiff's servant had such a clear space that he might easily have got away, then I think that he would have been so much to blame as to prevent the plaintiff's recovering'.

(c) *Pluckwell* v. *Wilson* (1832) 5 C. & P. 375. This case is cited in *McKittrick's Case* immediately after *Chaplin* v. *Hawes*. The court's comment is that this 'was a like case. The child is in the same position'. But the report of *Pluckwell* v. *Wilson*, discloses no child and no servant. The plaintiff appears to have been driving his chaise personally.

(d) *Williams* v. *Holland* (1833) 6 C. & P. 23. 'Case for driving a chaise against the plaintiff's cart, and overturning it and injuring the plaintiff's son and servant who was driving it'. The argument in this case turned on the question whether it should have been brought in trespass or in case.

The whole report of the summing up runs as follows: 'Bosanquet J., in summing up, told the jury that if the injury was occasioned partly by the negligence of the defendant, and partly by the negligence of the plaintiff's son, the verdict could not be for the plaintiff'.

So far then we have two English cases which suggest that the negligence of the plaintiff's servant will defeat the claim of the plaintiff. This seems a rather flimsy English foundation to support such a vast Canadian superstructure. But, even so, it may be enough. It may be said that the principle only applies where the servant is acting in the course of his employment. Of course, if the servant is so acting, it is clear that the servant's negligence *would* defeat the master's claim, just as much as the servant's negligence would make the master vicariously liable were he to be defendant and not plaintiff. But there is nothing in the judgments to suggest that the principle is so confined.

Knowlton's Case (*supra*) cites a dictum of Lord Esher in the Court of Appeal hearing of *The Bernina* (2) (1887) 12 P.D. 58 at pp. 61–62. Lord Esher says: ' . . . the question raised is, what is the law applicable to a transaction in which a plaintiff has been injured by negligence, and in the course of which transaction there have been negligent acts or omissions by more than one person? Upon many points as to such a transaction the common law is clear '. And then Lord Esher sets out eight points. *Knowlton's Case* cites points 7 and 8. ' (7) If although the plaintiff has not been personally guilty of negligence, his servants have been guilty of negligence which has partly directly caused the accident, the plaintiff cannot maintain an action against any one. (8) If although the defendant or his servants has or have been guilty of negligence, the plaintiff or his servants could by reasonable care have avoided the accident, the plaintiff cannot maintain an action against any one '.

Again the question arises, does this principle only apply where the servant is acting in the course of his employment? Lord Esher does not say so.

It may be said that the decision in *The Bernina*, affirmed by the House of Lords (13 App.Cas. 1), itself disposes of the point under discussion. But *The Bernina* is quite distinguishable from the case we are considering. What *The Bernina* did was to abolish the ' doctrine of identification ', so that a passenger in a public vehicle can recover damages from a colliding vehicle despite the contributory negligence of the driver of the carrying vehicle. But in such a case the driver of the colliding vehicle owes a clear duty of care to such passenger, so that the passenger has an entirely independent cause of action founded on a breach of duty of care owed to him personally. That is not the position here. The second plaintiff's cause of action is not in negligence at all; it is for the specific tort of causing loss of services or causing expenses, and it would lie equally whether the act which caused the injury were negligent or deliberate. But in the present writer's view it is a derivative tort, which only is a tort if it be caused by an act which is also a tort against the servant.

Kellock J., in *Jackson's Case* (*supra*), quotes from Lord Blackburn's speech in *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127 at p. 142. Lord Blackburn is speaking of the general principle that for a tort to arise there must be both injury and damage. 'So', he says, 'where a man beats another's servant, no action arises to the master until there is damage by the loss of the service, but no amount of damage would give the master an action if the beating was justifiable'. Does this mean justifiable as against the servant or as against the master? It is submitted that it means justifiable as against the servant, and that the question of whether or not it is justifiable against the master is entirely dependent on the prior question as to whether it is justifiable as against the servant.

Hilbery J., in his judgment in *Mallett* v. *Dunn* [1949] 2 K.B. 180 at p. 185, makes it clear that in his Lordship's opinion the effect of contributory negligence (at common law) was not to extinguish the defendant's tort. 'The claim by the wife was answered if, at the conclusion of the case, all that had been established was that both she and the defendant had tortiously caused her injury and damage, that is to say, if the defendant had proved that she had been guilty of contributory negligence. But it was implicit in such a result that the defendant had been guilty of negligence, *id est*, the tort alleged against him'.

It seems then that Hilbery J. accepts the view that it is necessary for the husband to show that the defendant has committed a tort *against the wife*. Whether the true effect of contributory negligence be to bar the remedy or to expunge the tort, the cases of *Chaplin* v. *Hawes* and *Williams* v. *Holland* (*supra*) are some—though admittedly slight—authority for the proposition that, at least where the plaintiff is master, the contributory negligence of the person directly injured defeats the claim of the person consequentially damaged. There seems no reason why this should not apply equally to a husband plaintiff where his claim is in respect of damage *caused by an act of negligence*. Of course, the husband's cause of action is separate from that of the wife, but it does not necessarily follow that it is independent.

Enticement and seduction stand apart from other actions by persons consequentially damaged. There, of course, the husband or parent does not rely on a cause of action vested in the wife or daughter. Indeed, he has an action precisely because the wife or daughter has none. The enticed wife and the seduced daughter share in the act complained of, and therefore have themselves no cause of action. But damage has been done to the husband or father and so the law gives him a right of action. There is a tort against the husband or father personally. But is this anomaly to be extended to cases where the act complained of is an act of negligence? Suppose a wife or child or servant is knocked down

in the street by the defendant motorist, who successfully pleads inevitable accident—is it to be said that the husband, parent or master (as the case may be) can yet successfully claim for the damage he has suffered?

The present writer respectfully adopts the view of Hilbery J. (p. 187) that the second plaintiff in such an action 'must succeed as to all his claim or totally fail'. To the extent that they deal with the reduction of the second plaintiff's damages the Canadian cases of *Yachuk* (*supra*) and *Knowlton* (*supra*) do not concern us. What may be the applicability of the relevant Canadian statutes does not affect the issue in respect of the Law Reform (Contributory Negligence) Act, 1945. But all the Canadian cases that have been cited above, and the American cases, are strong persuasive authority for the proposition that at common law the contributory negligence of the first plaintiff defeats the claim of the second plaintiff. There seems to be no English authority since the early nineteenth century, but there is respectable (if lay) authority for calling into existence the New World to redress the balance of the Old.

Then how does the matter stand since 1945? It is submitted that the Law Reform (Contributory Negligence) Act, 1945, does not affect the issue.

If, before the Act, the second plaintiff would have been defeated by the first plaintiff's contributory negligence, then he is still so defeated. The wording of the Act is not capable of being prayed in aid by husband, father or master. 'Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons . . .' cannot apply to him. Are we to conclude then, that, since the Act, the first plaintiff, who has been guilty of contributory negligence, is in a better position than the second, and entirely innocent, plaintiff? If so, this seems to be another instance where the Legislature did not say what it meant, and certainly did not mean what it said.

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STATUTES

Married Women (Maintenance) Act, 1949

This Act which came into force on December 16, 1949, remedies an injustice which had become increasingly grave in recent years. The maximum weekly payments which courts of summary jurisdiction can award under the Summary Jurisdiction (Married Women) Act, 1895, and the Married Women (Maintenance) Act, 1920, have been increased from £2 for a wife and 10s. for each child to £5 for a wife and 30s. for each child. This will enable justice to be done by the simple and inexpensive procedure of the magistrates' courts in many cases where previously a wife's only remedy was to petition in the High Court for judicial separation or, somewhat insincerely, for restitution of conjugal rights, in order to obtain an allowance commensurate with her husband's means.[1] An order made before December 16, 1949, may be varied on the application of the wife in order to increase the payments within the new limits, but the increase operates only from the date of variation.

Payments for the benefit of a child could previously be ordered only up to the age of sixteen, but the Act provides that these payments can be continued for periods of two years at a time up to the age of twenty-one, if it appears to the court that the child is or will be engaged in a course of education or training after attaining the age of sixteen, and that it is expedient for that purpose that the payments should continue. This welcome extension cannot, however, be made in an original order, but only on an application to vary an existing order for payment for the child's benefit. This has the strange result that a child, who attains the age of sixteen before the date on which the wife first obtained an order against the husband, cannot be given the benefit of payments for further education, because in such a case there can be no existing order. Moreover, if a wife first applies to the court shortly before the child attains the age of sixteen, she will have to apply again for variation in order that the payments may continue beyond the age of sixteen.

In addition to these provisions, the Act makes four minor amendments to the law:

(1) Section 25 of the Finance Act, 1944, in order to avoid difficulties which arose during the war when income tax liability spread to the lower-income groups, provided that tax should not be deducted from payments under ' small maintenance orders ', but that instead such payments should be a charge

[1] But see now s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949 (noted, p. 222, *infra*).

on the husband's income for tax purposes. This saved the wife the trouble of making tax repayment claims and the hardship of waiting until the tax was repaid before she received her full maintenance. Small maintenance orders were orders of any court in the United Kingdom for the benefit of a woman for her maintenance not exceeding £2 per week or for the benefit, maintenance or education of a person under sixteen not exceeding £1 per week. In order to fit in with the main provisions of the new Act, section 25 of the Finance Act, 1944, is amended by substituting £5 for £2, 30s. for £1, and the age of twenty-one for sixteen. This amendment is confined to payments made under the Summary Jurisdiction (Married Women) Act, 1895, and the Married Women (Maintenance) Act, 1920, which is a pity, because section 25 has proved useful also in relation to High Court orders, and would have been still more useful if the amendment had been of general application.

(2) Where maintenance is payable weekly through the collecting officer, a duty is now imposed on him to inform the wife if the payments fall into arrears to the extent of four weeks, unless he considers by reason of special circumstances that it is unnecessary or inexpedient to do so. The collecting officer must, at the request of the wife and at her expense, proceed in his own name for the recovery of any arrears, unless it appears to him unreasonable in the circumstances.

(3) On an order for custody, the magistrates are given power (which previously they had only under the Guardianship of Infants Act, 1925) to make provision for access. It is hoped that this power will not frequently be needed, because if parents cannot agree access a court order is rarely satisfactory. It is, nevertheless, desirable that any jurisdiction to order custody should include in reserve the power to deal with access.

(4) Proceedings under the Act of 1895 can now be taken in the court having jurisdiction for the place in which either party ordinarily resides, as well as in the court for the place where the cause of complaint arose.

Two further provisions of interest at one time included in the Bill were finally removed on the ground that they were too controversial. The first was a clause designed to enable wives to apply to the court for variation of an allowance fixed by a separation agreement before the passing of the Act. The second, of which the loss is to be regretted, was to give a right of appeal to quarter sessions from the decision of the magistrates in matrimonial cases, instead of a direct appeal to the Divisional Court as at present.

It is also to be regretted that the opportunity was not taken to increase to 30s. the maximum weekly payments under the

Guardianship of Infants Acts and the Bastardy Acts. The fact that the maximum under these Acts was 20s. was one of the arguments for amending the Married Women (Maintenance) Act, 1920, but the inconsistency has been perpetuated by the omission to bring up to 30s. the maximum weekly payment for children in all cases.

J. P. Lawton.

Law Reform (Miscellaneous Provisions) Act, 1949

The reform of the law of domestic relations is a protracted and somewhat haphazard process. Statute is piled upon statute and it is becoming increasingly difficult to keep abreast with the developments. Nowhere, it is submitted, is the need for simplicity and clarity more urgent than in the law governing the family, and nowhere is the case for codification stronger than here. Let it be granted that ' gradualness ' is inevitable where fundamental legal principles are as closely connected with the *mores* and convictions of the people as they are in this field. This need for caution in the legislative formulation of reforms is no excuse for deficiencies in legislative technique. In November and December, 1949, Parliament passed five statutes of major importance in the law of domestic relations. There is no sign of any attention having been paid to the need for co-ordinating these enactments. Indeed, one enactment, contained in a statute passed on December 16, 1949 (section 4 of the Adoption of Children Act, 1949), was repealed by another statute (Law Reform (Miscellaneous Provisions) Act, s. 7 (3)), passed on the same day.

The most far-reaching of these five enactments bears the title ' Law Reform (Miscellaneous Provisions) Act '. The accumulation of ' Miscellaneous Provisions ' Acts is liable to make things difficult for lawyer and layman alike. Statutes bearing this uninformative title are a conglomeration of enactments which, in the draftsman's opinion, are devoid of a common denominator other than the characteristic of ' reforming ' the ' law ' (which is true of every statute). There is apparently a subtle sense in which such statutes concern the ' law ' more than others. Dare one suspect that, subconsciously, this classification of statutes into those which reform the law and those which do not, is inspired by an idea of law as the sum total of those principles which happen to be of interest to barristers practising in the High Court ?

In the present instance it would have been easy for the draftsman to be more helpful in devising the short title. The entire enactment is concerned with family law or the law of domestic relations, and there is no visible reason why this should not have been expressed.

The ' Miscellaneous Provisions ' contained in the Act can be divided into two categories : those which reform the municipal law

of domestic relations, and those which primarily affect the principles of private international law.

I

(a) Much the most significant reform brought about by the Act is of a procedural character: the abolition of the rule in *Russell* v. *Russell* [1924] A.C. 687, by section 7. In future both husband and wife will be competent (but not compellable) witnesses 'in any proceedings' 'to prove that marital intercourse did or did not take place between them during any period'. Thus a husband will be able in a divorce case to give evidence of non-access so as to use the fact of the birth of a child as proof of the wife's adultery. Needless to say the substantive law of legitimacy is not affected by this section. It remains true that any child born *during* wedlock is rebuttably presumed to have been born *in* wedlock. It also remains true that this presumption applies even where the spouses have voluntarily separated, but not where they have been separated by order or decree (see *per* Goddard L.J. in *Ettenfield* v. *Ettenfield* [1940] P. 96, at p. 110). Only the means by which this presumption can be rebutted are altered by the statute, not the scope of the presumption. While the rule in *Russell* v. *Russell* thus passes into legal history, it will continue to be of interest to students of jurisprudence. They may perhaps be tempted to argue that Lord Mansfield, in *Goodright* v. *Moss* (1777) 2 Cowp. 591, might not have condemned the use of a declaration by either spouse for the purpose of proving the illegitimacy of a child born during wedlock as contrary to 'decency, morality and policy', if English law, like French law (Code Civil, art. 312–318) and other Continental systems required a formal act of '*désaveu*' on the part of the mother's husband in order to rebut the presumption of legitimacy. Nor perhaps would a majority of three against two law lords in *Russell* v. *Russell* itself have preferred the 'wide' to the 'narrow' interpretation of Lord Mansfield's rule, if it was clear that the status of the child could in no sense be affected by incidental evidence given in proceedings not directly concerned with the issue of that status, if in other words proceedings such as those provided for in section 188 of the Judicature Act, 1925, were not only permitted but required in order to change the status of the child. Be that as it may, the successful (*Farnham* v. *Farnham* [1937] P. 49; *Burgess* v. *Burgess* [1937] P. 60; *R.* v. *Carmichael* [1940] 2 All E.R. 165) and the unsuccessful (see *Ettenfield* v. *Ettenfield*, *supra*) attempts to whittle down the rule belong to the past, and once again an unnecessary hardship created by judicial legislation has been removed by Parliament.

(b) The 'putative marriage' is unknown to the common law. At common law, no child is legitimate unless it is born in lawful wedlock, though either parent or both parents may have honestly

believed that their union was a lawful marriage. Section 7 (2) of the Matrimonial Causes Act, 1937, introduced an exception to this hard rule by providing that a child born of a marriage avoided by reason of mental disease, mental deficiency or venereal disease was to be legitimate. This, however, left out of account the cases of marriages voidable on other grounds, such as physical impotence or refusal of intercourse. *Clarke* v. *Clarke* [1943] 2 All E.R. 540 (the case of *fecundatio ab extra*) and *R. E. L.* v. *E. L.* [1949] P. 211 (the case of artificial insemination) have shown the practical importance of the problem. Moreover, a child legitimated by subsequent marriage under the Legitimacy Act, 1926, lost its status of legitimacy if the marriage was annulled as a result of the refusal of either spouse to have sexual intercourse after the marriage. Now, by section 4 of the statute under review, children of marriages annulled by reason of any ground which makes them voidable are deemed to be legitimate notwithstanding the annulment. It is perhaps regrettable that Parliament has withheld this privilege from children of marriages void as distinguished from voidable. Parliament, like the Court of Appeal in *De Reneville* v. *De Reneville* [1948] P. 100, has thus given authority to the distinction between void and voidable marriages. This has now become a matter of vital importance, and it is high time that the borderline separating the two categories should be defined. To this day it has remained doubtful whether, *e.g.*, error, fraud and duress make a marriage void or voidable. It remains to be seen whether the differentiation between 'legitimacy' and 'birth in lawful wedlock' in English domestic law is going to have any repercussions in the treatment of legitimacy in the conflict of laws.

(c) The High Court has not hitherto had any jurisdiction to make a maintenance order 'in gross'. Its power to compel a husband to maintain his wife and children could only be exercised in connection with divorce or separation proceedings. A wife who desired to seek the assistance of the court without claiming separation or divorce was unable to obtain more than the limited payments that can be awarded by a court of summary jurisdiction under the Summary Jurisdiction (Married Women) Acts. Now, provided it would have jurisdiction to make a separation decree, the High Court may, by virtue of section 5 of the statute under review, order a husband to make to his wife such periodical payments 'as may be just'. The wife must prove that the husband 'has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage'. The court may order the husband to secure these payments. Section 6 extends the power of the court to discharge, vary, and suspend alimony, maintenance and similar orders.

(d) Section 9 lays down that upon an application for an order to make an infant a ward of court, the infant becomes a ward of

court on the making of the application. Rules of court may prescribe a maximum period for which this may continue. If no order has been made within that period, the infant ceases to be a ward of court. The court may, on application or of its own motion, order that a ward of court shall cease to be such. This removes the hardships hitherto caused by the irrevocable nature of the writ.

(e) The law governing divorce by reason of unsoundness of mind is very much in need of reform, but section 3 only introduces a minor change. By section 176 of the Judicature Act, 1925, as amended by section 2 of the Matrimonial Causes Act, 1937, a marriage may be dissolved if the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. As is well known, the definition of ' care and treatment ' in section 3 of the 1937 Act is extremely narrow. Shorn of its technicalities, it means that only a mental in-patient is deemed to receive care and treatment, and that he must, in the first place, have been certified or otherwise detained under one of the statutes governing the law of lunacy. Although it is the modern tendency of lunacy law to encourage voluntary treatment, treatment as a voluntary patient counts against the five-year period only if it ' follows without any interval a period of . . . detention ', *e.g.*, as a certified patient. Under the new Act detention or custody under the laws of Scotland, Northern Ireland, the Isle of Man or any of the Channel Islands, will, for the application of section 176 of the 1925 Act, be equivalent to detention under English law. Treatment as a voluntary patient in a mental hospital continues to be excluded from the definition of ' care and treatment ' unless it was preceded by certification. Had the Act been designed to deal with this more fundamental human problem, it might not have had the smooth passage through Parliament which it received. Section 8 deals with a minor point in the law of lunacy which does not call for review.

II

The statute may without exaggeration be called the most important Act of Parliament ever passed in connection with the conflict of laws. Section 1 (and, for Scotland, the corresponding section 2) introduces a revolutionary change in the law governing the jurisdiction of the courts in matrimonial causes and gives statutory force to a fundamental rule of the choice of law. The following sketchy remarks are not intended to give an exhaustive analysis of the problems raised by these enactments.

(a) The Act abolishes the principle that domicile is the exclusive basis of divorce jurisdiction. Inroads had been made upon that principle by section 13 of the Matrimonial Causes Act, 1937, and by the Matrimonial Causes (War Marriages) Act, 1944, but both statutes (which continue to be in force) are of limited operation.

The former can only be invoked by the wife (and in theory, though hardly in practice, by the husband) if the spouses were, at one time after marriage, domiciled within the jurisdiction and the husband has deserted his wife (or been deported) while still so domiciled. It provides no relief for the wife whose husband has never been domiciled here, and no relief in those cases in which the spouses separated while domiciled in this country if the husband has subsequently acquired a domicile elsewhere. On the other hand, it does not presuppose that the spouses or either of them are, or ever have been, resident in this country. The 1944 Act, sometimes referred to as ' the G.I. Bride's Magna Charta ', applies only to marriages celebrated between September 3, 1939, and a day still to be ' appointed ', and only for five years after that day. It permits the wife (not the husband) to petition for divorce if she was domiciled here immediately before her marriage and her husband was domiciled outside the United Kingdom at that time. Domicile and residence during the marriage are here irrelevant, except that the wife must not at any time during the marriage have resided with the husband in the country of his domicile. Neither of these statutes removes the hardship which, from the point of view of a woman resident in England, is wrought by the combined effect of the rules that a wife's domicile follows that of her husband, and that domicile is the basis of divorce jurisdiction. Very wisely, it is submitted, the new Act seeks to give the necessary relief by creating an exception to the second of these propositions and not to the first. The American courts involved themselves in great difficulties when they sought to help by permitting married women to acquire a separate domicile *ad hoc*. Under the Act the High Court and the Court of Session have jurisdiction in proceedings by a wife for divorce, if (1) she is resident within the jurisdiction at the time of the commencement of the proceedings, and (2) she has been ordinarily resident there for the last three years immediately preceding, and (3) the husband is not domiciled in the United Kingdom, the Isle of Man, or the Channel Islands. The common law jurisdiction based on domicile under the rule in *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517, the jurisdiction based on former domicile under the 1937 Act, and that based on the wife's pre-nuptial domicile under the 1944 Act remain unaffected. There is therefore a fourfold basis of divorce jurisdiction, and the practitioner will have to consider the common law and three statutes which partly overlap when deciding whether or not he can advise his client to seek a divorce in this country. It is arguable that this is not perhaps the ideal legislative method of dealing with a problem of this kind. We must, however, be grateful for small mercies and recognise that the Act has taken the sting out of the tail of a problem which has given rise to very great difficulties and conflicting decisions over half a century. New difficulties are bound to arise from the wording of the statute

itself. It must be hoped that the courts will not impose upon the petitioner the burden of the *probatio diabolica* that her husband is not domiciled in the United Kingdom, etc., despite the unfortunate wording of section 1 (1) (*b*) in which an ' unless ' would have been preferable to ' if . . . not ', because otherwise the object of the Act would be largely frustrated, especially in undefended cases. The conception of ' ordinary residence ' has hitherto been used in revenue law and also in branches of family law other than divorce law (see, *e.g.*, *Macrae* v. *Macrae* [1949] P. 397), but it is now likely to gain a prominence it has not had in the past. It is clear that it need not have been residence during the marriage, but what is not so clear is whether it means something in addition to, or something less than, residence pure and simple. Normally, it is submitted, the requirement of ' ordinary residence ' as distinguished from ' residence ' should prove a help rather than a hindrance to the petitioner, in that uninterrupted presence is not necessary and temporary absence innocuous. On the other hand, however, it may be said that it pre-supposes some sort of a psychological as well as a physical link with this country, though perhaps less than the full *animus manendi* required for a domicile of choice. If a stay always intended to be transient was regarded as sufficient to establish ' ordinary residence ', the courts might be faced with the distasteful task of introducing into English law an anti-evasion or *fraude à la loi* doctrine in order to prevent this country from becoming a Nevada in the minor key.

(b) ' Without prejudice to any jurisdiction exercisable . . . apart from this section ' the new rules enlarging the jurisdiction of the High Court and the Court of Session ' shall apply to proceedings for the nullity of marriage as they apply to proceedings for divorce ' (sections 1 (2) and 2 (2)). As a result of the decision of the Court of Appeal in *De Reneville* v. *De Reneville* [1948] P. 100, the principles governing the nullity jurisdiction of the courts have now become practically incomprehensible. The delimitation of criteria such as matrimonial domicile, domicile of the husband, and domicile of the wife, at the time of the marriage, and at the time of the petition, residence, and place of celebration, has proved to be an unending fascination for learned writers and an inexhaustible source of examination questions. For the practitioner it must have been a nightmare. The Act does not solve these problems, but it deprives them of most of their practical importance. Since they have usually arisen in connection with petitions brought by wives resident here, the subtleties concerning the necessity for, and the sufficiency of, other elements of jurisdiction will probably cease to trouble the practising side of the legal profession. The new provision applies to marriages alleged to be voidable as well as marriages alleged to be void. Not only the petitioners in *De Reneville* v. *De Reneville*, *supra*, and in *Casey* v. *Casey* [1949] 2 All

E.R. 110, but also presumably the petitioner in *White* v. *White* [1937] P. 111, could have relied on the new Act, though the latter would not have been prevented from relying on her separate domicile in the alternative. The Act would not, however, have assisted the petitioner in *Inverclyde* v. *Inverclyde* [1931] P. 29, whose husband was domiciled in Scotland. No ruling is given by the statute with regard to the equally complex problem of the recognition of foreign nullity decrees.

(c) Section 1 (3) and section 2 (3) are that rare phenomenon in a 'Law Reform' Act, a codifying provision in the true sense of the word. These enactments deal with what has unhappily become a matter of frequent occurrence: a petition to presume that the other spouse is dead and that the marriage should be dissolved (Matrimonial Causes Act, 1937, s. 8). In *Wall* v. *Wall* [1949] 2 All E.R. 927, Pearce J. held that this relief was 'not primarily and not in essence dissolution of marriage and was not intended to be so', and that therefore, in the case of a wife-petitioner, her residence and not the (probably unascertainable) domicile of her husband was the test of jurisdiction. All too often the petitioner will be the wife of a man who has never been domiciled in this country. The decision of Pearce J. made it possible for the English court to help the wife of a man deported and (presumably) killed in an extermination camp to get married again. The Act pursues the same policy, though its details differ from the ruling in *Wall* v. *Wall*. Where the petition is brought by the husband the court has jurisdiction if, and only if, the petitioner is domiciled within the jurisdiction. But the vital point is that where the wife is the petitioner, the court has jurisdiction if either (1) the husband was domiciled here on the last occasion when she knew or had reason to believe him to be living, or (2) she is resident here and has been ordinarily resident here for the last three years preceding the petition.

(d) For the first time the question of the law to be applied in matrimonial causes has been regulated by a statutory 'choice of law clause'. By section 1 (4) and section 2 (4) in any proceedings in which the court has jurisdiction by virtue of the sections under review, section 13 of the 1937 Act, or the 1944 Act, 'the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England (Scotland) at the time of the proceedings'. Until recently the question of the law applicable to the dissolution of a marriage had been much neglected in this country and submerged in the question of jurisdiction. The reason was obvious: until the coming into force of the 1937 Act the *lex fori* was inevitably identical with the 'proper law' governing the divorce, *viz.*, the law of the spouses' domicile at the time of the petition. Nor has any case been reported in which the law to be applied in a divorce case was even discussed, although such a case might have arisen where, as a result of the

1937 or the 1944 Act, the court exercised jurisdiction without being the *forum domicilii*. It has therefore never been decided whether English courts apply English law in matters of divorce because it is the law of the domicile or because it is the law of the court. The Act appears to assume that the former alternative is correct and lays down that, where the *lex fori* is not the *lex domicilii* it will in future be applied, not indeed as *lex fori* but as a fictitious *lex domicilii*. This solution of the problem is clear and satisfactory, both from a practical and from a theoretical point of view. The real difficulties begin where the new Act is to be applied to nullity and (by virtue of section 13 of the 1937 Act) to separation cases. Separation jurisdiction exists at common law on the alternative bases of domicile or residence or (possibly) ' matrimonial home ', but as Mr. Cross points out (Dicey-Morris, *Conflict of Laws*, 6th ed., p. 241) the courts have so far always applied English law even where it was not the law of the domicile. It may be surmised that they would also have done so in a case arising under section 13 of the 1937 Act. This, it seems, is confirmed by the new Act. The advantage of this solution is that it brings the practice of the High Court into line with that of the courts of summary jurisdiction. As regards nullity suits, however, this enactment would appear to be devoid of meaning. The substantive law governing the validity of marriages is not the law of the domicile at the time of the proceedings. It is sometimes the *lex loci celebrationis* and, with regard to other questions, that of the domicile of either spouse before the marriage (or, possibly, the law of the first intended ' matrimonial home '). The ' issue ' on the other hand whether for purposes of English nullity jurisdiction a woman can have a separate domicile depends on the law of the husband's domicile, not at the time of the petition, but at the time of the marriage. If, therefore, the subsection was intended to alter the law as laid down in *De Reneville*, it misses its purpose as well. All that remains is a truism, *viz.*, a reference to the English system of the conflict of laws.

O. Kahn-Freund.

CORRESPONDENCE

The General Editor,

I am indeed grateful to Dr. Hermann Mannheim for pointing out the ambiguity of an incidental expression of mine in Notes upon Recent Scottish Decisions [12 M.L.R. 513],—an ambiguity which flowed from omission of verbs from the phrase used. My reference to the Continental systems had in mind the origins of the Scottish rule as diverging from the English law of evidence; and was not intended to state the present rule on the Continent in terms of the Scottish law of corroboration. The ambiguity was all the less pardonable since I was already aware through, *inter alia*, Dr. Mannheim's own learned contributions that there is no longer an identity of view between the Scottish and the Continental systems upon sufficiency of proof.

T. B. Smith.

NOTES OF CASES

Unusual Danger—Invitee

Horton v. *London Graving Dock Co., Ltd.* [1950] 1 All E.R. 180.
Jennings v. *Cole* [1949] 2 All E.R. 191.
Stowell v. *Railway Executive* [1949] 2 All E.R. 193.
Turner v. *Arding & Hobbs, Ltd.* [1949] 2 All E.R. 911.

After eighty-four years the Court of Appeal has at last been called upon to settle a long-standing controversy caused by the ambiguity of Willes J.'s leading judgment in *Indermaur* v. *Dames* ((1866) L.R. 1 C.P. at p. 288). Is the duty of an invitor to an invitee to take care to make the premises reasonably safe, or merely to warn as to traps of which he knows or ought to know? These are the two possible interpretations of Willes J.'s enunciation of the rule: that the occupier shall 'use reasonable care to prevent damage from unusual danger, which he knows or ought to know', a form of words which has given rise to numerous but inconclusive dicta though hitherto to no authoritative exposition (see Salmond, 10th ed., pp. 479–481; Winfield, 4th ed., pp. 562–4). The profession will, no doubt, be grateful both to Mr. Horton for his timely intervention, and to the Court of Appeal for having adopted the interpretation which seems, on the whole, more consistent with recent developments in the law of negligence than a slavish adherence to the exact phrasing of the rule by Willes J., at a time when no general duty of care was recognised by the common law.

It is noteworthy that Willes J. confined the duty to '*unusual*' dangers. An unusual danger might either be one which is not generally encountered or one which is *unexpected*, *i.e.*, one which is not obvious and which cannot be reasonably anticipated—the latter interpretation being adopted by Phillimore L.J. in *Norman* v. *G. W. R.* [1915] 1 K.B. at p. 596. If the former view is adopted this means that one has to look at the particular danger in relation to the particular type of premises to see whether it is the sort of danger normally associated with such premises or whether it is something abnormal. Thus, ladders should usually have a complete set of rungs, and a ladder with a missing rung would, on this view, be an unusual danger, and the fact that the danger was obvious to anyone using it would not prevent the duty of care arising, however relevant it might be to the defence of contributory negligence or volenti non fit injuria. On the other hand, if 'unusual' means unexpected, the fact that the danger was obvious would be decisive in determining whether a duty existed, for an

injured person could not complain that a danger was unexpected if he either had full knowledge of it, or it was so obvious that as a reasonable person he must be deemed to have had such knowledge. Further, on this latter view, it would also be necessary to consider the 'personal equation' of the plaintiff as a factor, for a danger might be obvious to a person with special knowledge or experience while reasonably escaping the attention of an inexperienced person or a newcomer to the premises. It will therefore be apparent that two rather unsatisfactory consequences would flow from treating an 'unusual' danger as implying something not reasonably to be anticipated, *viz.* :—

(1) The question of the obviousness of the danger becomes linked with the existence of the duty rather than with the defence of contributory negligence, and, indeed, the latter issue would hardly be likely to arise at all, for a degree of obviousness sufficient to give rise to that defence would itself extinguish the duty. Hence no case for contribution would arise under the 1945 Act.

(2) Full knowledge of the danger would also prevent the duty from arising. Here, again, volenti would be inapplicable since knowledge alone without consent to incur the risk would deprive the plaintiff of this remedy.[1]

If, on the other hand, 'unusual' means no more than exceptional or abnormal, the obviousness of the danger would not be decisive, and issues of this kind would be relegated to the more appropriate sphere of matters of defence. And proof of contributory negligence would of course afford a case for possible apportionment, while volenti would not bar the remedy unless there was full consent to incur the risk in accordance with the usual rule. Further, a rule which imposes on an occupier the duty to take reasonable care to guard the plaintiff against exceptional dangers is certainly more consonant with the wide general duty to take care in all cases within the proximity test enunciated by Lord Atkin in *Donoghue* v. *Stevenson*. 'Unexpected' dangers, however, are for practical purposes indistinguishable from 'traps' or concealed dangers, though it should be noted here that a danger which is *visible* may still be a trap if it is not obvious to a person using the premises in a normal and reasonable manner. (Cf. *per* Lord Wrenbury in *Fairman* v. *Perpetual Investment Building Society* [1923] A.C. at p. 96.) A liability for traps even in this wider sense nevertheless falls a good deal short of the ordinary duty of reasonable care. And it would be unfortunate, indeed, if because the duties of occupiers were defined before the general law of negligence was worked out, this branch of law should now be allowed to lag

[1] This difficulty would, however, still remain in the case of licensees where the liability has never been put higher than in relation to 'traps'. A licensee who knows or ought to know of the danger is apparently without remedy even in the absence of contributory negligence or evidence of consent to incur the risk.

behind what is recognised at the present day as the universal standard of duty. Such a situation has occurred in some instances (*e.g.*, *Derry* v. *Peek* (1889) 14 App.Cas. 337, and *Cavalier* v. *Pope* [1906] A.C. 428) where earlier decisions of the House of Lords have proved insurmountable, but there seems everything to be said for not multiplying such instances.

The facts in *Horton's Case* were that the plaintiff was a welder of long experience, and had been employed for some months by sub-contractors in welding steel strips on the ribs of a trawler. This work was being performed by the plaintiff on a staging under the exclusive control of the contractors, who were the defendants in the action. This staging consisted of four boards, 5 feet apart, supported by angle irons. To get from one board to another the plaintiff had to step on the angle irons and, in doing so, he slipped and injured himself. There was evidence that the plaintiff had complained of the insufficiency of the staging to the contractors' charge-hand but nothing had been done about it. Lynskey J., taking the narrower view of the rule in *Indermaur* v. *Dames*, held that to an experienced welder such as the plaintiff, the danger was obvious and therefore could not be unusual, and hence any duty to the plaintiff was negatived. The Court of Appeal have now reversed this decision, holding that knowledge of the danger was not in itself decisive as to the existence of the duty to take care. The duty of the invitor is to take care not merely as to traps but as to uncommon or abnormal dangers, even if they are obvious. (See Singleton and Jenkins L.JJ., at pp. 184, 190.) Further, in the absence of a finding as to contributory negligence, or that the plaintiff had voluntarily incurred the risk, the plaintiff's actual knowledge of the danger did not avail the defendants, and the court went on to express the view that the principle in *Bowater* v. *Rowley Corporation* ([1944] K.B. 476) to the effect that volenti could seldom apply as between master and servant, applied equally where the plaintiff was the servant of sub-contractors working alongside the defendants' own employees.

Unfortunately, this does not entirely dispose of the question how far the knowledge of the plaintiff is relevant to the existence of a duty of care. Singleton L.J. was emphatic that the notice given to the plaintiff, or his knowledge actual or imputed of the danger, merely went to show a possible defence to a prima facie cause of action (see at p. 185). Tucker L.J., however, pointed out that in *Indermaur* v. *Dames* itself the hole in the floor through which the plaintiff fell was unknown to him, but to the regular employees it was a familiar feature of the premises (p. 188), and the latter would presumably not have been able to complain that there was an unusual danger. (It may be added that Lord Wrenbury in *Fairman's Case*, *supra*, had previously expressed the view that a workman habitually employed on the premises would probably have failed

to recover, on the facts of *Indermaur* v. *Dames*.) This seems to imply that the special knowledge of the plaintiff *may* prevent a danger being unusual in relation to himself, though the danger may still be unusual as regards less experienced or knowledgeable persons, a distinction which is tantamount to that applied by Lynskey J., and which was overruled. Perhaps the answer to this dilemma is that in all cases of negligence, including the present, the ' personal equation ' cannot be entirely ignored in considering whether there is a duty of care. In the course of an industrial operation it may be necessary to have a hole in the floor of a building which remains temporarily unfenced, and for workers familiar with the type of industrial activity involved or with the actual features of the premises there may be no breach of duty by the factory owner in exposing them to this risk. To expose an inexperienced visitor to such a risk may, on the other hand, be a breach of duty towards him to which contributory negligence will alone afford a defence. In other words, even in the sense of ' uncommon ' or ' abnormal ' a danger such as that in *Indermaur* v. *Dames* may not be ' unusual ' for the regular employees, whereas, in *Horton's Case*, although the plaintiff was fully conversant with the risk, it was still ' unusual '—and, indeed, he had complained about it though without effect—to have to work on a staging consisting of planks 5 feet apart.

Horton's Case is also of interest by reason of the opinion of both Singleton and Jenkins L.JJ., that in any event the case could have been decided not merely on the basis of the special rule in *Indermaur* v. *Dames* but also on the general duty of care arising from proximity as laid down in *Donoghue* v. *Stevenson*. Both the learned Lords Justices thought that the case would be governed by the principle that a person who provides defective gear or equipment for a given purpose is liable for any failure of ordinary care and skill (see pp. 186–190). It may be hoped that these dicta will have some effect in curtailing the tendency to treat any structure as analogous to premises and therefore governed by the duties of occupiers rather than ordinary negligence. This would have the further advantage of obviating the rather anomalous distinction between invitees and licensees in this class of case, though it is unfortunately too late to eliminate it from the law governing the duties of occupiers in the strict sense.

In *Jennings* v. *Cole* [1949] 2 All E.R. 191, the defendant's wife was bed-ridden, and he requested a neighbour to come into his house during his absence at work to look after his wife. While on such a visit, the neighbour slipped on a loose rug on a polished floor and was injured. Lynskey J. found as facts that the floor was polished round but not under the rug, that the plaintiff had been regularly visiting the premises for years, and that she knew exactly what the conditions were. It was held that the plaintiff was an

invitee,[2] but that she was not able to recover as there was no unusual danger. In view of the later decision of the Court of Appeal in *Horton's Case*, Lynskey J. would appear to have given undue weight to the fact that the plaintiff was fully aware of the conditions in the absence of a finding of consent to incur the risk, when the defence of volenti might have availed. Perhaps the decision is supportable on the ground that it really amounted to a finding of no negligence and is distinguishable on the facts from *Weigall* v. *Westminster Hospital* [1936] 1 All E.R. 232, where the floor was polished underneath the mat.

In *Stowell* v. *Railway Executive* [1949] 2 All E.R. 191, the plaintiff was on a railway station waiting to meet his daughter, who was to arrive there by train. While walking along the platform he slipped on an oily patch, which he had not seen, and fell. The presence of the oily patch was due to a want of care on the part of the railway's servants. On the footing that the plaintiff was an invitee it seems reasonably clear that on either view of the rule in *Indermaur* v. *Dames* the plaintiff was entitled to recover. The danger was not only 'abnormal' but also a 'trap', for, although visible, it was not necessarily obvious in the sense that a pedestrian ought to have noticed it. A pedestrian is not expected to walk along with his eyes glued to the ground, looking out for possible dangers. (Cf. *Almeroth* v. *Chivers, Ltd.* [1948] 1 All E.R. 53.) But was the plaintiff in *Stowell's Case* properly an invitee? Lynskey J. held that he was, on the ground that the railway has a material interest in inviting such a person on to its premises, both as a convenience to the passengers and also because it is thereby helped to clear the platform of passengers' luggage. The former ground seems perilously near the argument rejected in *Fairman* v. *Perpetual Investment Building Society, supra*, and the latter hardly assists where the passenger has no luggage and the person meeting him is not providing transport, and thereby helping to clear the station of passengers. Perhaps the visitor to the station might in all such cases be regarded as an invitee on the basis that it is in the interest of the railway that there should be friends of passengers available to render them any assistance they might need in connection with the journey. (Cf. *per* Denman J. in *Watkins* v. *G. W. R.* (1877) 46 L.J.Q.B. 817.) Such hair-splitting only serves to emphasise the unsatisfactory nature of the distinction, with its

[2] The defendant had a material interest in the plaintiff being on the premises, but was there a *common* material interest? Scott L.J. in *Hasledine* v. *Daw* [1941] 2 K.B. at pp. 3523, thought, contrary to the usual opinion, that a common interest is unnecessary so long as the occupier himself has a material interest in the presence of the invitee on his premises. Certainly there seems no reasonable ground on which a plaintiff should be in a worse position if he is serving the material interest of the occupier as an altruist rather than in the hope of benefit to himself. The observations of Asquith L.J. in *Pearson* v. *Lambeth B.C.* [1950] 1 All E.R. at p. 688, do not seem to carry this matter any further.

important legal consequences, between invitees and licensees. It may be added that in *Turner* v. *Arding & Hobbs, Ltd.* [1949] 2 All E.R. 911, Goddard C.J. applied *Stowell's Case* to a case where a customer in a grocery shop slipped on a piece of vegetable matter. The learned judge held that the danger was an 'unusual' one, having regard to the fact that the accident occurred not at a crowded shopping-time but in a slack period when the defendants might easily have noticed the matter on the floor and swept it up. Here, again, the result would probably have been the same whatever test was applied. The case is also of interest because the Chief Justice applied what was tantamount to the principle of *res ipsa loquitur* by holding that where an unusual danger is present which ought not to be present it is for the defendant to explain how it was that the accident happened, and in the absence of an explanation showing no want of care by the defendants, the plaintiff is entitled to judgment.

Dennis Lloyd.

Children as Witnesses

It would be regrettable if the quashing by the Court of Criminal Appeal of the conviction in *R.* v. *Reynolds* [1950] 1 All E.R. 335, were to discourage an interesting and, it is submitted, valuable initiative taken at the trial at quarter sessions against which in fact no objection was raised in the judgment on appeal. In a prosecution for indecent assault the question arose whether the principal child witness, aged 12, was to give evidence on oath, or whether she should be heard unsworn in accordance with the powers given by the Children and Young Persons Act, 1933, s. 38.

It is well known that the attitude of children to reality and truth differs widely from that of adults and that, while some young children will make fairly reliable witnesses, it is absurd to expect true testimony from others though older. For this reason English law, unlike certain Continental systems, wisely refuses to be bound by any fixed age limit for competence to testify or for capacity to take the witness oath, and leaves to the judge the duty to satisfy himself whether a child of tender age should, having regard to his particular mental development, be heard in evidence and whether the oath should or should not be administered. Section 38 of the 1933 Act does not lay down any criteria by which the decision is to be made other than by drawing a rather shadowy distinction which appears to imply that, before a child can be sworn, he must understand that his duty in giving evidence on oath is something more than the 'mere' duty of speaking the truth (cf. *R.* v. *Dent*, 71 J.P.Rep. 511). Nor does the section establish any particular method by which the judge is to form his opinion about the child's competence; indeed there appears to be no clear authority whether

it is for the judge or for counsel tendering the child witness to examine him, though it has become the invariable practice for the judge himself to put a few informal questions so framed as to give him a rough guide to the mental development of the child.

In these circumstances it is surprising that it should never have occurred to a court to call an outside witness who can speak about the child from personal knowledge in daily life. That is what was done in *Reynolds' Case*, where a school attendance officer was called as witness because he knew the girl at the school for mentally retarded children to which she had been sent. The Court of Criminal Appeal did not object to this solution which, it is submitted, might reasonably be employed more frequently in cases of this kind, but quashed the conviction on another ground, namely, because at the suggestion of the clerk of the peace the chairman had asked the jury to retire and the officer had accordingly been examined in their absence.

This irregularity, like the attempt, however desirable from a psychological point of view, to examine a child witness in the calm atmosphere of the judge's private room which was condemned by the Court of Criminal Appeal in *R.* v. *Dunne* (21 Cr.App.R. 176), clearly offends against the basic principle that criminal proceedings must throughout be conducted in open court. But subject to this, the precedent now set of calling, where this seems desirable, a witness to give evidence which may assist the judge in determining whether a child is to be heard in evidence and whether or not he is to be sworn, however unenthusiastically received by the Court of Criminal Appeal, was, with respect, surely sensible and deserves to be followed.

H. A. Hammelmann.

Criminal Law—Mens Rea and Statutory Offences

In *Younghusband* v. *Luftig* [1949] 2 All E.R. 73, the Divisional Court (Lord Goddard C.J., Oliver, Birkett, Lynskey and Sellers JJ.) emphasised the fact that *mens rea* is a necessary constituent of a statutory crime, unless its presence is excluded by express words or necessary implication. Lord Goddard C.J., delivering the judgment of the court, said, at p. 80 : ' No doubt the legislature can create offences which consist solely in doing an act, whatever the intention or state of mind of the actor may be. Common instances are provided by many of the offences created by the Defence (General) Regulations, 1939. . . . [It was an offence, for instance, to be found within a prohibited area. It was no defence for a person found there to say that he did not know, or even that, at the time, he had no means of knowing, that his presence was prohibited. Overriding considerations of safety placed on citizens the duty of finding out whether a place was a prohibited area or

not.] Of late years the courts have been so accustomed to dealing with a host of offences created by regulations and orders independent of guilty intention that it is desirable to emphasise that such cases should be regarded as exceptions to the rule that a person cannot be convicted of a crime unless it is shown not only that he has committed a forbidden act or default but also that a wrongful intention or blameworthy condition of mind can be imputed to him '.

The question in *Younghusband* v. *Luftig* concerned the correct interpretation to be put upon section 40 of the Medical Act, 1858, which in effect prohibits any person from *wilfully and falsely* using *certain* titles, such as physician, doctor of medicine, surgeon, *etc.*, which imply that he is registered under the Act, or from using *any* name, title or description which would give rise to a similar implication. The facts in the case were that the respondent, Luftig, was a doctor of medicine of the University of Berlin, but he was not a person registered under the Medical Act, 1858, nor was he entitled to be registered as such. He carried on in Brighton the practice of a consultant on eye troubles, and his notepaper and professional plate contained the letters ' M.D., BLN.' after his name. Until 1944 he had used the description ' M.D., Berlin ', but had then abbreviated ' Berlin ' to ' BLN.' in consequence of the receipt of threatening letters and the marking of swastikas on the wall of his house. In these circumstances he was charged with a contravention of section 40 of the Medical Act, 1858. The justices dismissed the informations which had been laid against him, on the grounds that he had not wilfully and falsely used the title of doctor of medicine, and that the title which he had used, *i.e.*, ' M.D., BLN.', did not imply that he was registered under the Medical Act, 1858. On being directed to state a case for the Divisional Court, they did so and the case was argued before the full court.

The questions for the court were :—

(i) To what extent was it open to the court to reopen the latest decision of the Divisional Court if it appeared that that decision was reached without regard to all the relevant authorities ?

(ii) Did the Act create an absolute prohibition against the use of the title of doctor of medicine except by persons registered or entitled to be registered under the Act ?

(iii) If there was not an absolute prohibition did the respondent wilfully and falsely use the title which he did in fact use so as to imply that he was a person registered under the Act ?

In answer to the first question the court held that a Divisional Court is bound by its own decisions to the same extent and subject to the same exceptions as is the Court of Appeal. One of these exceptions is that the court is not bound to follow a decision of its

own if it is satisfied that the decision was given *per incuriam* : see *Young* v. *Bristol Aeroplane Co., Ltd.* [1944] 2 All E.R. 300. *Per incuriam* according to the Court of Appeal in the *Young Case* meant ignorance of a *statute*, but Lord Goddard C.J. includes ignorance or forgetfulness of a *case* as well ([1949] 2 All E.R. 75). This enabled the court to reopen the decision in *Jutson* v. *Barrow* [1936] 1 K.B. 236, since some earlier authorities had not been cited in that case.

With regard to the second question, *Jutson* v. *Barrow*, *ibid.* at p. 248, contained statements to the effect that there was an absolute prohibition against the use of ' the named words and title or of any other titles having the same implication '. The court, however, after an elaborate review of the the earlier authorities, came to the conclusion that the presence of the words ' wilfully and falsely ' negatived the implication of an absolute prohibition. These earlier authorities showed that where a person had a genuine degree of doctor of medicine granted by a foreign university he was entitled to use it provided that his use of it did not imply that he was a person registered under the Act. But where he had a bogus degree he would be acting ' wilfully and falsely ' in describing himself by reference to it (cp. *Andrews* v. *Styrap* (1872) 26 L.T. 704; *Carpenter* v. *Hamilton* (1877) 37 L.T. 157). There was accordingly no absolute prohibition against the use of the title of doctor of medicine except by persons registered or entitled to be registered under the Act.

In answer to the third question the court pointed out that if the respondent had described himself as ' M.D., Berlin ', he would not have been guilty of an offence. ' He is describing himself there as what he is and the addition of the word " Berlin " shows that he is not claiming to be possessed of one of the degrees mentioned in Schedule (A) to the Act and does not, therefore, represent that he is registered '. The difficulty arose because of the abbreviation ' BLN.' which on his own admission he had used to conceal the fact that he had obtained the degree in Germany. The justices had, however, found that in doing so he was not acting ' wilfully and falsely ', and furthermore they considered that the use of ' M.D., BLN.' did not amount to a representation that he was registered under the Act. This latter point could have been decided differently, but as there was evidence on which the justices could decide as they did the decision would not be reversed.

O. R. Marshall.

Criminal Law—Contributing Cause and Effective Cause

Problems of causation in criminal law have not been worked out with the same elaborate detail as in other branches of the law. But the existence of the problem cannot be denied, though no general

theory has been propounded for its solution. Thus ' causing death ' is an essential ingredient of homicide, but it does not follow that *every* act of the accused will be regarded as the *cause* of death. It is generally agreed that the ravisher or seducer who gets a woman with child does not cause her death if she subsequently dies in childbirth. But if X shoots and wounds Y in the leg, and Y subsequently dies from blood poisoning, X's act is the effective cause of death, notwithstanding the fact that amputation of the injured leg might, and probably would, have saved Y's life (*R.* v. *Holland* (1841) 2 Mood. & R. 351). So, too, it is a well-settled rule that an accused person is not guilty of ' obtaining by false pretences ' unless the prosecutor parted with his property by reason of and in reliance upon the pretence made by the accused. This does not mean that other factors may not contribute to the parting with the property, but it does require the pretence to be the effective cause thereof. All we can say, therefore, is that causes fall into two categories, contributing and effective, but our ability to categorise is neither assisted nor hampered by the existence of any exact principles. A line of demarcation exists between contributing causes and effective causes, but it is not drawn with that degree of precision which would predicate infallibility in placing a case in one category rather than in the other. *R.* v. *Button* [1900] 2 Q.B. 597 is an example of an *effective* cause; it may be predicted that *R.* v. *Clucas* [1949] 2 All E.R. 40 will find its way into the textbooks as an illustration of a *contributing* cause.

In *R.* v. *Button*, by representing that he was one Sims, a person of no special athletic competence, the accused obtained a very favourable handicap in a race. He was in fact a winner of a previous race, and but for his pretence he would probably have received no start at all. He won the race but did not claim the prize. The jury found that he had not competed merely for ' a lark ', but had made the false representations fraudulently and with intent to obtain the prize. He was accordingly convicted of the attempt, and his conviction was affirmed by the Court of Crown Cases Reserved. Before them reliance was placed upon *R.* v. *Larner*, 14 Cox 497, in which on similar facts it had been held that the prisoner did not obtain the prize by false pretences but merely the right to compete in the race and the opportunity to win the prize. It was contended that Button's success was not the effect of the entry, but of his actual skill in running. These contentions were rejected, and *R.* v. *Larner* overruled. In the words of Lord Goddard C.J. in *R.* v. *Clucas* [1949] 2 All E.R. 40, 42, ' by the false pretence he obtained for himself a winning chance which otherwise he would not have had, and thereby enabled himself to win the prize '.

The same could not be said of the facts in *R.* v. *Clucas*. In that case the accused, together with one X, induced a bookmaker to accept bets from them by representing that they were acting as

agents for a number of workmen who were making small bets on various races. They were, in fact, betting on their own account in very considerable sums. As a result of one such bet the accused obtained a cheque for £123 6s. 7d., and he was charged with obtaining it by false pretences. He was convicted at Norwich Assizes before Hallett J., but his conviction was quashed on appeal by the Court of Criminal Appeal (Lord Goddard C.J., Oliver, Birkett, Lynskey and Sellers, JJ.). In the words of Lord Goddard C.J., delivering the judgment of the court ([1949] 2 All E.R. 40, 42) : 'It is impossible to say that there was here an obtaining of the money by false pretences . . . because the money was obtained, not by reason of the fact that the accused persons falsely pretended that they were somebody or acting in some capacity which they were not, but because they backed a winning horse as a result of which the bookmaker paid them the sums obtained. . . . we must distinguish between a contributing cause and the effective cause . . . what led to the payment of the money was the fact that the men backed a winning horse'. This situation seems to be similar in all material respects to that in which a person obtains employment by means of false representations as to his qualifications. If he subsequently receives wages, he cannot be convicted of obtaining by false pretences since the wages were paid not because of the false pretence but as remuneration in respect of the work which he actually did. (See *R.* v. *Lewis*, Somerset Assizes, January, 1922, Rowlatt J., reported in Kenny, *Cases on Criminal Law*, 6th ed., p. 344; not cited in *R.* v. *Clucas*.)

The distinction between the two cases appears to be that in *R.* v. *Button* the accused obtained by the pretence an advantage in the race itself which directly led to his success, whereas in *R.* v. *Clucas*, what the accused obtained as a result of the pretence was the status of a punter; therefore he was in the same position as any other punter *vis-à-vis* the bookmaker. It continues, however, to be a matter of regret that the application of the tag *contributing* to one set of causes and of *effective* to another should be based on no exact principles.

O. R. MARSHALL.

VALUED POLICIES IN FIRE INSURANCE

WITH reference to my note on *Elcock* v. *Thompson* [1949] 2 K.B. 755, and valued policies in fire insurance, Mr. R. E. Megarry has drawn my attention to a passage in Welford and Otter Barry on *Fire Insurance* (4th ed., p. 295) where the learned authors express the view that since 'what is valued is the subject-matter of insurance and not the amount of the loss' . . . 'the valuation is only operative in the case of a total loss of the subject-matter, and is not,

in the case of a partial loss arising out of damage to the subject-matter, taken into consideration '. And in a footnote this is stated to be ' in accordance with the usual practice '.

This view seems to me to derive more validity from the fact that it is the established practice than from the argument on which it is based. As I said in my note the practice in the marine insurance market is understood to be the same. What is found to be the most satisfactory practice by business men should, unless it is repellent to natural justice, or, though this is more doubtful, plainly irreconcilable with authority, always be accepted by the courts as the proper rule of mercantile law.

It may well be right, therefore, in normal cases of partial loss, to ignore the valuation in the policy, but this hardly follows from the fact that what is valued is the subject-matter and not the loss. This argument is based upon a statement by Atkin L.J. in *City Tailors, Ltd.* v. *Evans* (126 L.T. 439 at 444) which is also quoted by Morris J. in the instant case. The policy in that case, however, expressly provided that partial losses were to be dealt with on the basis of the agreed value in the policy, though Atkin L.J. nowhere suggests that without such a provision that method would have been wrong, and since normally the amount of depreciation is the measure of indemnity it is necessary to start by ascertaining the value of the subject-matter before the fire: the valuation in the policy never purports to do more than this.

The cost of reinstatement may sometimes furnish the measure of indemnity but, as Messrs. Welford and Otter Barry point out, this is by no means always so. Certainly a case where the cost of reinstatement would be more than twice the value of the property at the time of the fire would appear to be an obvious exception.

C.

Bills of Exchange—Consideration

Oliver v. *Davis and Another* [1949] 2 All E. R. 353 settles a doubtful point in the law relating to negotiable instruments. It will be recalled that section 27 (1), Bills of Exchange Act, 1882, provides that ' Valuable consideration for a bill may be constituted by (*a*) Any consideration sufficient to support a simple contract; (*b*) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time '. One of the questions which had to be determined in the present case was whether payment could be enforced of a cheque drawn to pay an antecedent debt of a third party. Was such debt ' an antecedent debt or liability ' within the meaning of section 27 (1)? The Court of Appeal, reversing the decision of Finnemore J., held that ' an antecedent debt or liability ' within the meaning of the section is a debt or liability

from the maker or negotiator of the instrument and not from a third party. This decision, therefore, is in accordance with the view expressed in *Byles on Bills of Exchange* (20th ed.) p. 133, that ' if the instrument is payable immediately, it is conceived that the pre-existing debt of a stranger could not be a consideration . . . '.

Oliver v. *Davis* is of considerable interest, not only because of the specific point which it decides, but also because it illustrates the way in which the courts approach decisions on a particular branch of the law which has been subsequently codified by Act of Parliament. A case decided in 1887 had made it clear that, when dealing with a negotiable instrument given in respect of a debt of a third party, consideration must be found such as would be sufficient to support a simple contract : *Crears* v. *Hunter* (1887) 19 Q.B.D. 341. This decision, though subsequent in date to the Bills of Exchange Act, 1882, was decided on the law prior to the codification, because the instrument in question was given in 1877, that is, before the Act came into force. The question arose, therefore, whether it was permissible for the courts today to regard *Crears* v. *Hunter* as authoritative or whether the express provisions of the code should be treated as having replaced the pre-existing law.

The correct way of interpreting a code in relation to the pre-existing law was a problem which was referred to by Lord Herschell in *Bank of England* v. *Vagliano Brothers* [1891] A.C. 107 at p. 145. He said that he was ' far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate '. It was this principle which Somervell L.J. applied in *Oliver* v. *Davis*. He said that he was prepared to assume that ' reading section 27 (1) (*a*) and (*b*) together, the natural construction of " antecedent debt " is that it means a debt due from the person who gives the negotiable instrument in question. . . . Assuming, however, in favour of counsel for the plaintiff, that the words of the Act are of doubtful import, [*Crears* v. *Hunter*] is a case which we can apply. On that basis it seems to me to resolve that doubtful import in the sense in which I have indicated. . . .' : [1949] 2 All E.R. at pp. 360–361. Sir Raymond Evershed M.R. and Denning L.J. were also of opinion that the appeal should be allowed.

J. Milnes Holden.

Wilful Refusal to Consummate: Jurisdiction and Choice of Laws

The need to distinguish in nullity causes between jurisdictional bases and the proper law determining substantive issues arose again in

Casey v. *Casey* [1] where a soldier domiciled and normally resident in 'Canada' (the province is unspecified) married an English girl in England. After short periods of cohabitation in England and Canada, the wife returned to England and brought a nullity suit, not contested by her husband, on the ground of his wilful refusal to consummate the marriage. The Court of Appeal, emphasising the husband's domicile and residence abroad, held that English courts were not competent to entertain her petition. It had already decided in *De Reneville* v. *De Reneville* [2] that residence of the petitioner alone in England was no basis of jurisdiction, leaving open for future consideration cases where both the parties were resident in England (not in point in *De Reneville* or *Casey*, though favourably commented on in both), where the marriage was celebrated in England, and where hardship was pleaded (both these latter bases being relevant in *Casey* but not in *De Reneville*). Another contemplated ground of nullity jurisdiction, one on which much of the discussion in *De Reneville* had revolved, was whether there could be jurisdiction based on a separate domicile, recognised in England, accorded the wife by the proper law of the parties' status, that is, by the law of the husband's domicile at the time of the suit. Whether or not the wife could acquire such a separate domicile would probably depend on the view taken of the alleged defective marriage by that domiciliary law, which might or might not acknowledge the concepts of void and voidable with their attendant implications as understood in English domestic law.

On the issue of jurisdiction, Bucknill L.J. said he would follow a passage of Lord Greene's in *De Reneville* in order to show that the 'law applicable' in *Casey* was the law of Canada, 'because the husband *is* domiciled in Canada, and because at the date of the marriage it was the matrimonial domicile in reference to which the parties may have been supposed to enter the bonds of marriage'. But Lord Greene was not dealing at that stage with jurisdiction but with the substantive defect when 'essential validity' as opposed to 'forms' was in issue. Further, not only had Lord Greene specified the law of the husband's domicile at the date of the marriage and not at the date of the hearing, but he had in any event expressed preference for the law of the parties' matrimonial domicile. It obviously cannot be presumed for all cases that the husband's domicile at time of marriage, his domicile at time of suit, and the matrimonial domicile will coincide, as they did in *De Reneville* and in *Casey*.[3]

When dealing with the substantive defect alleged, Bucknill L.J. automatically assigned wilful refusal to the category of 'essentials'

[1] [1949] 2 All E.R. 110.
[2] [1948] P. 100; [1948] 1 All E. R. 56.
[3] Compare [1949] 1 All E.R., 115–16, with [1948] 1 All E.R. 61, or [1948] P. 114; see Fleming in (1948) 10 M.L.R. 98; also *Manella* v. *Manella* [1942] 4 D.L.R. 712 (Ontario).

of marriage. In conflict of laws at least, an exact definition of the term is desirable and necessary [4] and Barnard J. has characterised this concept with 'its peculiar feature of being based on a post-nuptial fact' as either a 'defect in marriage, an error in the quality of the respondent', to be governed by the lex loci celebrationis, or possibly as a matter pertaining to capacity to contract a marriage, referable to the individual domiciliary laws of the parties prior to their marriage. This latter suggestion, by making willingness to consummate an integral part of capacity to contract a marriage, would be an overt recognition of the tacit reversal in 1937 of the maxim *consensus non concubitus facit matrimonium:* the broad principle after that date is that without consummation there is no marriage. But while 'wilful refusal' makes a marriage voidable, this is by no means a final analysis. A marriage may be automatically void, but whereas law X may apply if it is a case of non-compliance with formal requirements, law Y may be relevant if the defect alleged relates to essential validity. Similarly it cannot be presumed that one body of law governs all categories of voidable marriages. *Casey* was argued only on wilful refusal, but this was equated with what in *De Reneville* was the alternative ground of impotence: Lord Merriman P. has pointed out 'the embarrassment of the alternative pleading' of wilful refusal and impotence, the former being a 'creature' of a statute, whereas the latter, apart from the general terms of section 22 of the 1857 Act, is altogether free from statutory guidance.[5] On either of Barnard J.'s analyses, the woman in *Casey* could have made out the substantive defect she alleged, recognised as it was by both the lex loci and her pre-marriage domiciliary law.

As to jurisdiction based on a possible separate domicile for the wife, Bucknill L.J. interpreted two Saskatchewan decisions of 1928 to mean that *all* Canadian courts at that time regarded a marriage void for impotence as one void ipso jure. He thought, however, that after *Inverclyde* and *De Reneville*, the Canadian courts would hold that both impotence and wilful refusal made a marriage only voidable, so that, assuming English and Canadian notions to be identical on this point, the wife could not acquire a separate domicile by 'Canadian' law. 'Canadian' law had not been proved to the court: this was unfortunate, for not only do the Canadian provinces differ in their laws of nullity and in their characterisation of the relevant concepts and principles, but none of them recognise wilful refusal as a defect in marriage.[6] In Alberta the concept of a

[4] Lord Jowitt L.C. thought a definition of wilful refusal undesirable, *Horton* v. *Horton* (1948) 63 T.L.R. 62; cf. *Gordon* v. *Gordon* [1948] N.I. 174; 'consummation' is defined in *Baxter* v. *Baxter* [1948] A. C. 274.

[5] *Harthan* v. *Harthan* [1949] P. 126–27; [1948] 2 All E.R. 643.

[6] See Falconbridge (1948) 26 Can.Bar Rev. 917; Gilbert D. Kennedy (1947), 25 Can.Bar Rev. 1016; cf. *Hall* v. *Hall* [1947] 4 D.L.R. 631 (Manitoba).

separate domicile for a wife and the distinction between void and voidable marriages for jurisdictional purposes are relevant. In British Columbia that distinction is not accepted, and further, neither the courts of this province nor of the provinces of Ontario and Manitoba accept jurisdiction when only the petitioner, even when a husband, is domiciled within their territories.[7]

As to jurisdiction based on an English locus celebrationis Somervell L.J. indicated a distinction between suits where the validity of the ceremony itself was impeached and those where other issues as to valid celebration were raised; in the latter category, celebration in England might justify the courts in taking jurisdiction. In the case of 'voidable' marriages, the locus contractus has no jurisdiction.

Bucknill L.J., approving in effect of *Inverclyde*, held there was no jurisdiction 'mainly on the analogy of the rule that the court of the domicile of the husband is the sole court in dissolving a valid marriage . . . A similar rule should be applied to a marriage which is merely voidable on the ground of wilful refusal to consummate it'. It is significant, however, that Somervell L.J. specifically disapproved of Bateson J.'s statement in *Inverclyde* that only the courts of the parties' domicile have jurisdiction in cases of voidable marriages; moreover, he said, Lord Phillimore's statement in *Salvesen* that only the courts of the domicile have jurisdiction to annul a marriage not properly celebrated was obiter and had not been followed in later cases. It is still reasonable to hope, therefore, that a more exact analysis of voidable marriages will be made in future judgments.

It was assumed in *Casey* that a remedy was open to the petitioner in another law-district: this supposed fact was coupled with a reluctance to do injustice to the respondent who on geographical grounds alone found it difficult to appear and defend the suit. But hardship on the woman was as significant and should have been as decisive in *Casey* as it was in *White* v. *White*.[8] Though the Canadian courts could overcome the jurisdictional barrier on the basis of bilateral domicile or residence, on the substantive issue they would not, if domestic law applied, have recognised wilful refusal as a ground of annulment. The Court of Appeal was perhaps unduly influenced by the fact that the petitioner could have brought her petition in Canada during her stay there, a stay which excluded the Matrimonial Causes Act of 1944 from being used in her favour. The question of divorce was not raised, but that would have been a matter for the courts of the husband's domicile, and it is not at all

[7] *Spencer* v. *Ladd* [1948] 1 D.L.R. 39 (Alberta); *Gower* v. *Starrett* [1948] 2 D.L.R. 853 (British Columbia); *Manella* v. *Manella* [1942] 4 D.L.R. 712 (Ontario); *Hutchings* v. *Hutchings* [1930] 4 D.L.R. 673 (Manitoba).

[8] [1937] P. at pp. 124–25.

clear that the woman would have had any grounds for dissolution of marriage either in Canadian or English laws.[9]

If wilful refusal had been considered a defect in marriage, it would have been competent for the locus celebrationis to have heard the case; if it had been characterised as a matter of capacity, again English courts, being those of the woman's pre-marriage domicile, could have heard it on the *Sottomayor* v. *De Barros* principle. These possibilities were not considered in *Casey*.

The limitation of the bases of jurisdiction in nullity causes is not to be admired. Beginning with *Inverclyde* too many technical distinctions have been imported from domestic matrimonial law into jurisdictional issues, this in spite of the strong, and, it is respectfully submitted, logical and historically correct opposition of *Hutter* v. *Hutter*[10] and *Easterbrook* v. *Easterbrook*.[11] Moreover, the distinction of jurisdictional and substantive questions put forward in *De Reneville* requires a more exact characterisation than that indicated by the terms ' void ' and ' voidable '. So far this necessity for further subdivision has been recognised in the case of void marriages, but voidable marriages have been indiscriminately characterised as of one kind. The importance in conflict of laws is not whether a marriage is void or voidable, but by what body or bodies of law, having regard to the nature of the defect alleged, it should be referred in order to ascertain first matters of jurisdiction, and then, referring possibly to the same or different bodies of law, matters of the substantive cause of nullity.[12] This process may be complicated and difficult, but should not be evaded by construing a statutory ground of nullity into a basis of divorce.

Joseph Jackson.

Unlawful Performance of Mohammedan Marriage

Another step, though a very limited one, was taken in *R.* v. *Rahman* [1949] 2 All E.R. 167 towards an accurate definition by English courts of their comprehension of marriages not ' Christian ' in the *Hyde* v. *Hyde* sense: (1866) L.R. 1 P. & D. 130. The accused was a Mohammedan who had purported to perform an Islamic marriage ceremony in England between another Mohammedan, alleged to be already married in India, and an English woman previously converted to the same faith. The marriage was solemnised in a house which was neither registered in compliance with the Marriage Act, 1836, nor exempted therefrom by special licence. The contention was made, inter alia, that no ' marriage '

[9] The separation in *Casey* seems to have been by mutual consent. See also *Weatherley* v. *Weatherley* [1947] A.C. 628; *Walsham* v. *Walsham* [1949] 1 All E.R. 774, 775.
[10] [1944] P. 95.
[11] [1944] P. 10.
[12] See (1949) 27 Can.Bar Rev. 173.

within the penal section 39 of the Act had been performed because the alleged union was potentially polygamous and so not recognisable by English law. Streatfeild J.'s answer was two-sided : (1) English law already recognises polygamous marriages in certain contexts (*Srini Vasan* v. *Srini Vasan* [1946] P. 67). (2) It is performance of a *purported* marriage which is the offence under section 39; by analogy, the word 'marry' in the phrase 'Whosoever, being married, shall marry . . .' in the bigamy section of the Offences against the Person Act, 1861, clearly refers to a 'purported marriage or form of marriage'. Unlawfully to perform a Moslem marriage ceremony is as much an offence as any other unlawful solemnisation under section 39. In coming to these conclusions, the learned judge indicated that the construction of the word 'marriage' might be different in Acts concerning matrimonial causes. *Rahman* turned on the criminal offence of performing a purported marriage for which penal provision a Moslem marriage is a marriage within the 1836 Act: the decision has nothing to do with the law of bigamy. The headnote to the case which refers to the marriage in India as being material is misleading in this aspect. The learned judge did not refer at all to the fact that the male party was alleged to be a party to a subsisting marriage; he was concerned only with undue performance, not with bigamy. If the ceremony in *Rahman* had complied with English formal requirements, the question might then have arisen whether a second marriage in England between parties whose personal laws recognised polygamy was to be condemned as felonious when at one and the same time it gave rise to certain English civil rights. In *Baindail* v. *Baindail* [1946] P. 122, in a judgment favouring the annulment of a marriage in England between a Christian English woman and a Hindu on the ground of the Hindu's prior (polygamous) marriage, Lord Greene, then M.R., specifically left open the question of bigamy for a case where that point actually arose. The connecting factor is not the religion of the participants but their personal laws; the conversion to Islam, as in *Rahman*, would not justify a party's polygamous marriage in England, aliter if the party's domicile was in a law-district recognising polygamous marriages (see *Dicey*, 6th ed., at p. 228; the contrary view is stated in 99 L.J. at pp. 522–23).

Joseph Jackson.

Wrecks as Prize

The Riva Ligure and The Antonia C. (1949) 65 T. L. R. 736.

Although there is no outstanding point of prize law dealt with in this decision it is considered that it merits report in view of the fact that it carries Lord Merriman's decision in *The Bellaman* (this Journal, vol. 12, p. 108) a stage further. In that case Lord Merriman reserved for future decision any question concerning the

limits of the Port of Massawa. In *The Riva Ligure* this point was in issue.

The Riva Ligure and *The Antonia C.* had been scuttled by Italian forces shortly before the British occupation of the port of Massawa. The former vessel was found in a partly submerged condition in a bay immediately to the south of the harbour. Since, however, part of its mouth 'shades off' into the harbour the President had no hesitation in finding that the vessel was within the harbour limits and captured at the same time as the harbour.

The factual situation concerning *The Antonia C.* was a little more complex. This vessel had been taken out about a mile and a half into deep water in the Harkiko Bay beyond the artificial breakwater and was there scuttled. The President considered two problems to be in point. First, whether *The Antonia C.* could still be described as a ship and not a piece of wreckage, and, second, whether she could be described as being within the limits of the port.

In view of the fact that the vessel had been scuttled because the port was about to be captured, and 'if she could fairly be said to be within the port, she was captured as a ship and not as a piece of wreckage'. Lord Merriman pointed out that the case differed from that of *The Alberto Treves*, which concerned a vessel that blew up in 1938 and had been at the bottom of the sea and not worth salving. In some ways the case can be compared to *The Kriti*, which came before an Italian Prize Tribunal in January, 1943. A Greek vessel was sunk in the Piræus by an Italian bombing raid. After the Italian occupation of the port the 'wreck' was salved, and the tribunal held that, from the point of view of prize law 'every kind of floating craft which constitutes, actually or potentially, complete, partial, principal or accessory, means which may be used for maritime traffic' constitutes a ship (*Annual Digest*, 1943–45, No. 184). Lord Merriman seems to have had a similar distinction in mind.

Having decided that the *res* was still a ship, the President then considered her geographical location. He felt that this was a borderline case, but bearing in mind all the circumstances—her position and her scuttling there because of the imminent capture of the port—he held that she should be considered as having been captured with the harbour.

Lord Merriman left the way open for a reconsideration of harbour limits by British Prize Courts for 'progress from one degree to the next must not be taken as likely to proceed indefinitely without check'.

L. C. Green.

REVIEWS

FREEDOM UNDER THE LAW. By SIR ALFRED DENNING. [London : Stevens & Sons, Ltd. 1949. viii and 126 pp. 8s. net.]

THIS book consists of four lectures given by Denning L.J. under the terms of the Hamlyn trust. The object of this trust is to make known to the 'common people' of the United Kingdom the privileges which they enjoy in law and custom 'in comparison with other European peoples'. The old lady who established this trust no doubt formed her views in Victorian times when the superiority of the English was only too clear to themselves, if not always so apparent to their neighbours, so she may be forgiven her complacency, especially as it has resulted in the course of lectures reproduced in this volume. They are, in fact, the first Hamlyn lectures to be given, and the trustees who represent several of the leading University Law Schools are to be congratulated on having secured Sir Alfred Denning as their first lecturer, for he possesses in large measure those qualities of a fair and liberal mind, a profound knowledge of the law, and a capacity for lucid exposition which make the English judiciary at its best second to no other.

Sir Alfred Denning was indeed fortunate to be able to choose as his subject, civil liberty, a branch of their law of which Englishmen have, indeed, the right to be proud, and in respect of which it is not unfair to say that the 'common people' of the United Kingdom enjoy privileges which were for long denied to people living under Continental systems, and which even today are in a number of respects not satisfactorily secured in most foreign countries.

Although these lectures are intended for ordinary people, and their style is such that any literate person should be able to grasp and enjoy the greatest part of them, they will undoubtedly be chiefly welcome within the legal profession, and to students of political science. It has always amazed me that there is so little good writing on civil liberties; most of what there is being tucked away in journals and pamphlets. These lectures do not fill this gap—they could not do so in the space available—but they certainly provide a valuable general survey of the greater part of the field. The main lacunæ are the rights of association, and public gathering, which are of great importance in political organisation.

On few subjects have men written more, and to less purpose, than on liberty. It is a conception dearer to most men than any other, one for which they are ever ready to die, and one which they are only too ready to deny to their fellows. Yet it is one which eludes definition in any satisfactory terms. Indeed it is a conception which differs from one age to another, and from one country to another. The classical idea of liberty was by no means that of the Englishman, shall we say, in 1800. The views held by the present generation of Englishmen are certainly not those of 1800, and, indeed, they vary substantially from one Englishman to another: if Mr. Attlee and Mr. Churchill were to compare notes they would probably find that they differed from one another on the subject almost as much as they agreed. But then, of course, if they discussed the matter with Stalin, or any representative Russian Communist, they would find a divergence which altogether transcended their own substantial disagreements.

This is not really a surprising situation except, perhaps, to those who conceive of freedom in absolute terms. Since it is a conception relating to man in society it must clearly vary with types of society, and with the progress of society. In early societies it will be rudimentary and completely

negative—indeed, the view of freedom as a mere absence of restraint is one which dies hard, for it is not only a fundamental element in the conception, but one which is reasonably easy of definition in terms both of law and of political science. But in advanced democratic societies liberty inevitably becomes dynamic and positive in its content, for the citizen cannot be regarded as really free unless he is educated, economically secure, and even, perhaps, rejoicing in good health. It is obvious that the more enlarged the frontiers of liberty become, the less satisfactorily can it be measured simply in terms of absence of restraint, and the more complicated become the adjustments required to ensure to each individual citizen the measure of freedom which he ought to have. In the past, liberty in this wider sense has been the privilege of minorities. It does not appear possible with the resources, material and otherwise, at the disposal of society at the present time to secure a large measure of liberty for the wide masses in the community without some curtailment of the freedom of those minorities. Hence both parties representing the masses and parties representing minorities can march into battle under banners inscribed with the same word, 'Liberty', though they are really out to get very different things.

It is not possible to effect any complete reconcilement of these differing conceptions, which, indeed, may derive from the conditions of a past generation, and bear very little relationship to the liberty required by society at the moment of discussion. Freedom must respond to 'the felt needs of the times', perhaps more than any other principle of law or politics, and at a time when the great problem is the relationship of the individual citizen to the State, liberty, which is the measure of the solution of that problem, is peculiarly difficult to assess. Perhaps the most satisfactory suggestion which has been made for reconciling these difficulties is to regard liberty as concerned with securing a balance between the different interests which can, and do, legitimately exist, whether within the State, or between States.

It may be thought, and with justice, that the considerations just outlined are likely to prove somewhat esoteric to 'the common man', and if Sir Alfred Denning had devoted his first lecture to an elaboration of them, the Hamlyn trustees might have had a just grievance. He does nothing of the sort, but, like a good practical lawyer, proceeds immediately to define the subject-matter of his first lecture 'personal liberty' as 'the freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasions without let or hindrance from any other persons', a definition clear enough to the ordinary citizen. Yet underlying the greater part of all his discourse the reader will find a philosophic conception of liberty which clearly has regard to the considerations which I have discussed above, and which has, I think, enabled him to form the balanced and integrated view of this field of the law which is here set out.

The lord justice is certainly an adherent of the 'balance' school: 'whenever (says he) these interests (*i.e.*, those of ordinary people) are nicely balanced, the scale goes down on the side of freedom. In these lectures I hope to show how the English law has kept in the past the balance between individual freedom and social duty, and how it should keep the balance in the social revolution of today . . .'. Some of the illustrative examples which he works out in detail are fascinating in their interest. He shows how the amount of power entrusted to police constables has been adjusted to obtain such a balance, and traces the empirical decisions which, after giving too little power to the police, and then too much, have finally settled down at a just reasonable balance—'the way in which we in England have balanced conflicting interests on this important point—the power of arrest is a model'. Even more instructive is the history of confessions made to the police which is traced at pp. 30–31.

In his second lecture on Freedom of Mind and Conscience the lord justice seems rather to forget his principle of balance, and, for him, leans unexpectedly

far back to find a kind of golden age in the law as it stood under Victoria or even earlier. He dislikes the recent expansion of public mischief which has taken place in order to cope with offences which are peculiar to our modern times. He does not conceal his satisfaction that the jury in *R.* v. *Caunt* should have acquitted the publisher of a strongly anti-Semitic article, and indicates that he thinks the conviction of the prisoner in *R.* v. *Leese* of public mischief for a similar publication was quite wrong. But where is the balance here? Whipped up to a state of bestial sadism by newspaper articles which freedom of the press, so called, in Germany allowed to go unpunished and unchecked, the Nazi thugs eventually exterminated some six million Jews. I find it difficult to understand how restraining violence of this type can properly be regarded as an interference with the freedom of the press—such unfettered criticism is not liberty at all but licence, and offends fundamentally against that very doctrine of balance to which in his earlier lecture the lord justice attaches such importance. I would even suggest that it is really doctrinaire liberalism of exactly the same type as produced decisions such as *Mayor of Bradford* v. *Pickles,* which elsewhere in the book are subjected to well-merited contempt. The anti-Semitism in the *Caunt Case* was no doubt a mild affair compared with the violence of Der Stürmer, but mustard trees grow from small seeds. Much the same point can be made in respect of the defence of fair comment in libel cases which the lord justice thinks has been refined to the point where it does not give the press an effective defence. Surely the reason why it was refined was because the judges found that when simply applied in the way that Sir Alfred Denning appears to think desirable, it gave the press a complete licence for defamation, and in order to establish a balance the doctrine had to be redressed in favour of the citizen, becoming, of course, more complicated in the process.

In dealing with freedom of mind and conscience there is much less legal material available, so that the lecturer was thrown back into a rather more general type of speculation in which he moves less surely. His comparison of the United Kingdom with Russia in the field of religious freedom is highly unrealistic. The warfare between the Communist State and the Roman Church, however deplorable, is fairly joined, and it is absurd to picture the aggression as being all on one side, for the Church launched the attack, and can hardly complain that the Communist animal is wicked because he defends himself, even if his methods involve hitting below the belt. Indeed, one has to go back to the time when the Protestant queen Elizabeth was deposed from the throne of England to get a real understanding of the struggle which is now going on between Rome and the Communist States. This is a struggle for dominance—it has nothing to do with freedom.

These short comparative sections, no doubt inserted for the purpose of satisfying the terms of the Hamlyn trust, are the least satisfactory part of the book. Sir Alfred Denning is not a profound student of comparative law and his illustrative material, being taken from France and Russia only, does not give a realistic view of the Continental situation generally. Moreover, in the case of Russia there is so little factual material readily available that it is quite impossible to reach an objective conclusion in respect of such matters as civil liberties in that country: the political cases which are high lighted are not necessarily a guide to general practice. Sir Alfred Denning is probably justified in what he says about Russia, for the Russian conception of liberty is not ours, but one has an uneasy fealing that Russia is being used as a hobby horse for the purpose of justifying Miss Hamlyn's insular prejudices.

In his third lecture 'Justice Between Man and the State', Sir Alfred Denning returns to his earlier realistic point of view. Here again it is a question of striking a balance. 'The extent to which judges in the nineteenth century carried rights of property seems to us today to be almost incredible' —coming from a judge this is a statement of appalling frankness, and equally

appalling truth—now, of course, the pendulum is swinging the other way, perhaps too far the other way. There are, moreover, whole sets of new obligations and rights established by welfare legislation as between 'citizen' and the State which confront the courts with problems of a kind with which the common-law technique is hardly fitted to cope, at any rate if used in the restricted fashion characteristic of recent generations of judges. This has become so clear to the executive and the legislature that they have set up a host of new tribunals. This problem is, of course, one which has been much debated by lawyers and political scientists during the last thirty years. Sir Alfred Denning handles it in a sympathetic and broadminded manner. He recognises the need for a vast amount of so-called administrative justice, but pleads persuasively for a genuine right of appeal. In this he is very much in line with progressive opinion generally, and it is to be hoped that under the present Lord Chancellor who has so many reforms to his credit, steps may be taken to set up an Administrative Court of Appeal. Although Sir Alfred is too modest to say so, the value of a right of appeal and the lines on which appellate jurisdiction should be exercised are best illustrated by his own work as nominated judge to hear appeals from the Pensions Appeal Tribunal. There is little doubt that the way in which he preserved a balance between the subject and the State did much to restore public confidence in circumstances where grave consequences might have ensued had such confidence become seriously undermined.

This leads us naturally to a consideration of the powers of the executive. The positive and dynamic welfare State can only be achieved at the expense of entrusting the executive with very substantial powers which 'involve interference with private rights and interests: and, granted that private rights must often be subordinated to the public good, it is essential in a free community to strike a just balance in the matter'. The final lecture is a very fair and understanding commentary on this text. It is instructive to compare the lord justice's cool and measured appraisal of the situation with the fevered declamations of Dr. C. K. Allen. He does not find that there has been much abuse of power by the officials, to whom he agrees that wide powers have been entrusted—indeed, I think he is rather over optimistic in this estimate. He points out that there is a real danger of abuse, but emphasises that the law provides a number of substantial safeguards against such abuse. Nevertheless, the situation which is still very fluid is obviously one which will have to be watched carefully, and handled with circumspection. There will be few who have watched the development of executive power during the present century with any attempt at objectivity who will not have come to much the same conclusion on the subject as Sir Alfred Denning, and who will not wish that when problems of its use or abuse come before the courts they may be handled with the knowledge and understanding which have contributed to make these lectures an outstanding event in modern political jurisprudence.

C.

English Contributions to the Philosophy of Law : The Seventh Annual Benjamin N. Cardozo Lecture delivered before the Association of the Bar of the City of New York, May 25, 1948. By Arthur L. Goodhart, K.C., Professor of Jurisprudence in the University of Oxford. With an Introduction by Cloyd Laporte. [New York : Oxford University Press; Geoffrey Cumberlege. 1949. 44 pp. English price 5s.]

Professor Goodhart has on more than one occasion had the merit of having explained to English lawyers American legal thought and to American lawyers the legal thought of this country. In this wholly admirable lecture,

delivered before one of the most influential bodies in the U.S.A., he has dealt with a topic which—certainly outside this country, and perhaps also within this country—has been somewhat neglected during the formative period of most lawyers who are now in actual practice: the English contribution to the Philosophy of Law. The choice of the lecturer for this topic or of this topic by the lecturer was most fortunate, not only because of his undisputed mastery of his subject-matter, but also because this lecture was linked to the name of Benjamin N. Cardozo. Cardozo's philosophy was pragmatism and in the view of Professor Goodhart pragmatism is the philosophy which is most typical of English contributions to legal thought. Thus there is in his view a fundamental likeness of approach between the typical viewpoint of English legal philosophers and the basic attitude of one of the greatest exponents of American legal thinking.

Cardozo has said, that a philosophy of law will tell us 'how law comes into being, how it grows and whither it tends'. Professor Goodhart has taken these words as his inspiration and unfolds before his listeners the views of the greatest of English legal thinkers on these three questions. Of course it would have been possible to write a volume of considerable size on this subject. But the English contribution to legal philosophy has been made by essays rather than by bulky volumes. It is, therefore, perhaps symptomatic that this first comprehensive survey should be in the form of an essay—fortunately one that lacks neither in profundity nor in elegance of presentation. Although reasons of time and space rendered it necessary to exclude the works of living scholars from the scope of the lecture, references to English legal literature range far into the past and well-nigh into the present time. Comparative remarks on American and Continental authorities put the views of English writers into proper relief. Copious notes supplement not only the learning, but sometimes even the humour contained in the text.

Nobody will be able to read a work of this type written by an author with such outspoken views without feeling here and there that he would like to join issue on one or the other point. The present reviewer, who still remembers bits of his Continental schooling, cannot always see eye to eye with Professor Goodhart in his representation of the contrast between English and Continental legal thinking as one between a concrete and an abstract or a practical and a theoretical approach to the problem. But as he hopes to be able soon to deal with this aspect of contemporary English criticism of Continental legal thought in extenso in another connection, he may be allowed to do no more here than to register a protest.

But there is perhaps a more fundamental point which cannot be shelved. As Professor Goodhart rightly says, the English contribution to legal philosophy has not found much attention and still less approval among Continental scholars. This, no doubt, is unpardonable in the case of the 'pure theory of law', which on so many points is simply Austinianism in twentieth-century garb. But is it equally unpardonable in other cases? And are the absence of a proper school of legal philosophy and the unsystematic nature of the English contribution the sole reasons for this neglect? The present reviewer thinks that it would be doing an injustice to the Continental historians of legal philosophy if one were to answer this question in the affirmative. What is legal philosophy? The answer given to this question by the majority of Continental scholars is very different from that given by Cardozo. In their view legal philosophy is a systematic endeavour at explaining the conception and the ideal of law and their relation to each other. Questions such as those which in Cardozo's opinion exhaust the province of legal philosophy are, in their view, not even within that province. The origin of law is a question of history and sociology. The growth of law is a question of constitutional theory, of positive law, of legal methodology, of legal history and sociology and of a host of other special sciences. The tendency of law

is a question of legal deontology or critical jurisprudence, of political science and its auxiliary sciences, such as psychology and economics.

Now Professor Goodhart is, of course, entirely correct in saying that those English scholars, with whose works he deals and whose neglect he rightly deplores, were devoting themselves to just these three problems. But Continental legal philosophers were not interested primarily in these, but in much more fundamental, though perhaps less immediately useful, problems. From their point of view the English contribution to legal philosophy in the late nineteenth and early twentieth century was therefore insignificant. They might, and did in fact, highly value the work of Dicey in the field of constitutional theory and of legal sociology. They could and did respect Sir Frederick Pollock as a distinguished English jurist. But they could not possibly consider either of these scholars as a philosopher. Of course, these and other English jurists had their own ideology, though none of them ever systematically expounded it. Professor Goodhart characterises this ideology in words whose moving character is rightly pointed out by Mr. Laporte in his graceful preface. But a jurist with an ideology of his own is not a philosopher. A Windscheid or a Gierke, a Capitant or an Eugen Huber were great jurists. Each had his own ideology and each has told us about it in essays or at least in addresses. But is any one of these great jurists a legal philosopher? None of them ever claimed that illustrious title. They and their contemporaries may therefore well be forgiven if they refused to bestow it on Dicey, Salmond, Holland or Pollock and others, whose great work lay in the field of the general theory of law, but not in that of legal philosophy, such as the Continental legal philosophers—rightly or wrongly—understood the latter to be defined.

Perhaps some of my readers might think that that field is theoretical, without interest to practitioners and thoroughly barren. I cannot deal with this objection here. But if they should think that Professor Goodhart's essay deals with questions far more attractive to the average lawyer than the theory of the conception and of the ideal of the law, I would certainly agree and urge them to study for themselves this book whose value is wholly out of proportion to its diminutive size.

E. J. Cohn.

Legal Theory. By W. Friedmann, of the Middle Temple, Barrister-at-Law, Professor of Public Law, University of Melbourne. Second Edition. [London : Stevens & Sons, Ltd. 1949. xxiii and 470 pp. 30s. net.]

Legal Theory was first published in 1944, a second impression was called for in 1947, and a second edition has now been issued. There could be no better evidence that Professor Friedmann has made an important contribution to the jurisprudential literature of this country, and that he has shown that the English lawyer is not as indifferent to legal philosophy as he is sometimes supposed to be. It has been given an equally favourable reception in America, Judge Jerome Frank saying in the *Harvard Law Review*: 'A multitude of books has been written on this subject. To my mind this is by all odds the best'. This is high praise when we remember that Sir Frederick Pollock, Dean Roscoe Pound, Sir Paul Vinogradoff, and Dr. C. K. Allen have also made contributions in this field.

This book, as the author points out, 'is not concerned with the whole field of jurisprudence but with that part of it which concerns the ends of law'. Its purpose is to give an account of the main trends of legal philosophy, and to investigate the relations between legal theory, social evolution and positive law. Even so limited, it is obvious that Professor Friedmann has had to cover an extraordinarily wide and difficult field, and he is to be congratulated

on his success in doing so. It may be felt by some readers that undue emphasis has been placed on the German legal philosophers of the nineteenth century and on the Austrian school of recent years, but it must be remembered that they have been more influential on the Continent than in this country. Professor Friedmann's analysis of their ideas is clear and interesting, and if some of the conclusions which they reached are frequently difficult to understand and sometimes of doubtful value this is not his fault.

The introductory chapter on 'Greek Philosophy and the Problems of Legal Theory' has been expanded in the present edition, but even so it is a difficult task to cover Greek thought in less than ten pages. It is impossible to understand mediæval legal philosophy without a clear conception of Aristotle's doctrines, and today Plato is still a living force. There is hardly a single juristic problem which was not originally discussed in the Athenian schools, so that more space might, with advantage, have been devoted to them. It may also be suggested that in a book which deals with 'the main trends of legal philosophy' some references should have been made to the Roman jurists who constructed the greatest legal system of all time. Thus, for example, Cicero's theory concerning the relation between law and the State has been of more importance in the history of juristic thought than has the cloudy mysticism of Hegel which is dealt with at length.

Although Professor Friedmann is not a whole-hearted disciple of Kelsen's, he devotes more space to him than to any other legal philosopher. He says (at p. 115) that 'the chief merit of Kelsen's pure theory would seem to lie in the elucidation of the relation between the initial hypothesis (which might less abstractedly be described as the basic political faith of the community) and the totality of legal relations derived from it'. It is difficult to pin legal philosophers down to a precise meaning, but if by 'initial hypothesis' Kelsen means the legal constitution of the State, then we doubt whether this distinction is a merit because it avoids the major problem in legal philosophy: Can the constitution be described as law, and why is it regarded as valid? Professor Friedmann says (at p. 114): 'But surely the fact that the ultimate authority in any given legal order may be a composite one, as in the United States of America or in Great Britain, does not alter the fact that such ultimate authority must exist'. This 'ultimate authority' is strangely reminiscent of Austin's sovereign. Merely to state that there must be an ultimate authority does not answer the basic question concerning its nature. Is the ultimate authority pure fact or is it created by the law? If we assume that the ultimate authority in the United States is found in the various bodies which can amend the Constitution, we are still faced with the problem why these various bodies are recognised as having the power to amend the Constitution. To say that the Constitution is a 'grund-norm' tells us nothing about the Constitution. Similarly, it does not take a profound legal philosophy to discover that in Great Britain, while Parliament is in being, the ultimate authority is the King-in-Parliament, but it is more difficult to find the grund-norm when Parliament has been dissolved. Professor Friedmann quotes, with approval, Professor Laski's statement that, 'Granted its postulates, I believe the pure theory to be unanswerable, but I believe also that its substance is an exercise in logic and not in life'. If this is true, then it seems difficult to understand why so much emphasis is placed on a logical exercise in a book which is concerned with law as a living force. Moreover, if the postulates are wrong, then the logical exercise is not only valueless but it is also misleading. We have seen this in the case of Austin. Granted his postulates that law is a command and that there must be a sovereign in every State then his theory is unanswerable, but that does not make his doctrine any more acceptable to those who refuse to accept his original postulates.

The catholicity of Dr. Friedmann's learning is shown by his interesting section on Herbert Spencer, a section which is all the more valuable because

that Victorian philosopher has been almost forgotten in England today. It is strange that his influence on the Continent has been more permanent. We doubt whether he would have approved the statement that his 'theory of ethics and law appears to be entirely positivist and relativist, dependent upon the matter presented from outside', because he disliked general terms. He purported to base his conclusions on strictly scientific facts, but unfortunately they were neither scientific nor facts. He applied the doctrine of the survival of the fittest to social life, with the result that he reached conclusions that are shocking to most people at the present time.

The section on Bentham has been amplified. It is not only the bi-centenary of his birth which has rekindled interest in that great reformer. He is of importance today because in a changing world we are seeking for some standard by which we can test the efficacy of law. As Professor Friedmann points out, his greatest contribution can be found in his attempt to direct the aims of law to practical social purposes instead of relying on abstract propositions. His weakness was that he failed to understand that man is a complex being whose acts are only in part the result of rationalism, and that he did not sufficiently realize that there might be a conflict between individual and community interests.

Perhaps the most interesting new pages are those in which Dr. Friedmann discusses Pound's sociological jurisprudence. He points out that his classification of six major social interests is in the nature of a catalogue to which additions and changes have constantly to be made. Moreover, they fail to answer the primary question concerning the relative value of the various interests.

The chapter on 'Socialist Thought on Law' has been largely rewritten because in recent years new theories have been developed and old ones discarded. The original Marxist doctrine seems to have assumed that as law was the result of the class conflict therefore it would disappear with the destruction of capitalism. This doctrine has been replaced, together with the liquidation of some of its supporters such as Pashukanis, by the new concept of 'revolutionary legality'.

Chapter 23 on 'Legal Ideals, Public Policy and the Practical Lawyer' has been rewritten in large part. It uses recent cases to show that judges may be influenced by their conception of public policy. It is surprising that this obvious truth should have ever been doubted: the danger today is that the influence of public policy may be exaggerated. Professor Friedmann quotes (at p. 307), with apparent approval, Jerome Frank's statement that a judge arrives at his decision 'by a hunch as to what is fair and just or wise and expedient'. With all respect, this doctrine, if taken literally, would make nonsense of any legal system because it would leave us without any law. To deny the truth of this statement it is not necessary to go to the other extreme which seeks to establish absolute certainty in the law. On p. 319 Dr. Friedmann refers to my statement made in 1930 (*Essays in Jurisprudence and the Common Law,* p. 50) that the attitude of American judges to the binding force of precedent is a much freer one than is found under the English system, but he says that 'his view of the English position must be read subject to the very noticeable change which has since taken place'. I wish that he were right, but in view of the recent decision of the Court of Appeal in *Young* v. *Bristol Aeroplane Co.* [1944] K.B. 718, which has held that that court is absolutely bound by its own previous decisions there seems to be no valid ground on which his view can be supported. Perhaps he is a little too ready to recognise changes in the law because these changes seem to be desirable. Thus he says (at p. 327) that Denning J.'s decision in *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.* [1947] 1 K.B. 130 'brings English law back to the ideas of Lord Mansfield'. But in law, as elsewhere, one swallow does not make a summer, and it remains to be seen whether the Appellate Courts will accept this interpretation of the law.

Chapter 26 on 'Theories of Corporate Personality and Legal Practice' is an interesting attempt to deal with this difficult problem in a few pages. Professor Friedmann suggests that in English law the distinction between incorporated and unincorporated associations appears to be 'very fragile' because 'unincorporated associations of a "quasi-corporate" type, such as Trade Unions, have been declared liable for torts of their servants by the *Taff Vale Case* . . .'. But, with all respect, that case hardly supports so radical a conclusion, for it was decided, not on any general principle, but on the interpretation of the Trade Union Acts, 1871 and 1876. No one has ever denied that Parliament cannot give legal personality to an association which has not been incorporated in the usual manner, and that is all that their Lordships held had been done by those Acts. Nor is it clear what cases support the statement (on p. 371) that 'realists can point to the extent to which unincorporated associations, such as many English clubs, colleges and guilds, with a strong corporate life, enjoy legal personality, despite the absence of formal incorporation; a fact which discredits, in particular, the concession theory'. Unfortunately a member who joins an unincorporated English club may find, to his bitter regret, if large debts have been incurred, that the absence of incorporation is of far greater importance than Professor Friedmann seems to think it is.

The chapter on 'State Sovereignty, International Order and the Rule of Law' is dominated by the Kelsenite philosophy. Thus Professor Friedmann says (at p. 382) that 'following Kelsen, Verdross and Lauterpacht have demonstrated the logical completeness of international law, even where it has not yet evolved a concrete rule'. We might also say that a legal system which provided that in every case in which one person sues another the decision shall be given in favour of the plaintiff was logically complete; this statement may be true but it is really meaningless. Of more practical importance is the statement (at p. 381) that 'there can either be a number of sovereign States, each claiming to be the highest authority, or an international authority, superior in law to the national States. Equality of States can only be derived from a superior authority'. It is not clear what is meant by 'superior authority', but it seems to suggest that the national States cannot be bound by international law until a supra-national State has been created. This is a logical conclusion to reach if we accept the neo-Austinian theory of law, but it is not true if we think of law as a body of rules which is recognised as being obligatory.

The last two chapters on 'The Principal Antinomies in Legal Theory' and 'Legal Values of Modern Democracy' are of outstanding interest. The latter illustrates the important truth that no line can be drawn between political and legal philosophy if legal philosophy is to be more than a collection of arid concepts.

In this review I have differed from Professor Friedmann on a number of points, but this is not meant as a criticism of his most interesting book. It is a poor legal philosophy which does not give rise to a conflict of views. It is just because this book stimulates discussion, that it is so valuable.

A. L. Goodhart.

The Planned State and the Rule of Law. By W. Friedmann. [Melbourne University Press. 32 pp. 2s. 6d. net.]

Professor Friedmann has set out to give the coup de grâce to the mythological 'rule of law' concept which is better fitted to satisfy the emotional needs of economists hankering after an atomistic society than the intellectual consciences of those interested in clarity of legal and sociological thought. It was high time, indeed, that a lawyer of Professor Friedmann's experience and acumen should demonstrate the false antithesis between

'predictability' of the law and State planning of economic activities. It is an astonishing spectacle that the utopia of a fixed and rounded system of legal rules, the ideology of what may be called 'false Benthamism', should linger on in the writings of liberal economists, decades after it had ceased to be taken seriously by thinking lawyers on either side of the Channel or of the Atlantic. The legal problems raised by a planned economy are real and urgent, but they can neither be solved by that 'delusive exactness' which Holmes called 'a source of fallacy throughout the law'[1] nor by the magical superstition that a State agency offers a higher guarantee for 'impartiality' if it is called a 'court' than if it is called an 'administrative tribunal'. Professor Friedmann's essay is a working programme and a call to action for those lawyers who refuse to turn the clock back. He provides a rough classification of the functions of the State in a planned economy and pays special attention to the problems raised by the co-existence of a 'public' and of a 'private' sector. He shows how many aspects of the law of contract and the law of tort have to be thought out afresh in the light of the modern social welfare State, and how modern administrative law is beginning to evolve a new system of guarantees for the freedom of the individual. All these ideas are developed with the help of a wealth of concrete material, and the author deserves to be congratulated for the clarity of his exposition and the lucidity of his style. It is to be hoped that Professor Friedmann will be able further to expand the programmatic ideas set out in this little book.

O. K-F.

David Dudley Field Centenary Essays. Edited by Alison Reppy, Professor of Law, New York University, with an introduction by Russell D. Miles, Dean of the School of Law, New York University. [New York : University School of Law, Washington Square East. 1949. xxiii and 400 pp.]

The common lawyer who casts an occasional glance, whether complacent or envious, at the codified systems of the civil law countries does not always pause to consider how much codification there has been in his own common law world. In this chapter of legal history the American David Dudley Field (1805–1894) is perhaps as important as Bentham; in some ways he has left a more definite and enduring mark. Field was, unlike Bentham, a practical lawyer; he was not content to argue for a code and expound principles of codification, but with tireless energy and constancy of purpose he devoted himself, in spite of the calls of a busy practice, to the difficult labour of drafting codes and urging them on an often reluctant Legislature. 'Had he been born, say in 1770 instead of 1805, and reached his maturity while the reception of English law was still doubtful'—this is the judgment of Roscoe Pound—'his urging of and framing of codes, while agitation for them was strong and the law in most American jurisdictions was still largely formative, might have changed the whole course of development of our law. As it was, he came to his life work as the law was ceasing to be formative but before it was sufficiently systematised to be codified, and had to encounter the rising and finally dominant historical jurisprudence with its powerful advocate among the leaders of the New York bar'.

Field's most important immediate practical achievement was the adoption in 1848 of the New York Code of (Civil) Procedure which *inter alia* swept away the common law forms of action and effected the merger of law and equity; within twenty-five years the Field Code had been adopted by twenty-four States, and by the present day the great majority of the States, and also the Federal Courts, have reformed systems of procedure in which the

[1] Dissenting judgment in *Truax* v. *Corrigan* (1921) 257 U.S. 312.

influence of Field can be directly or indirectly traced. His Code of Criminal Procedure, though not adopted in New York until 1881, has had as wide an influence in the sister States. Of his substantive law codes the Penal Code was eventually adopted in New York, as well as in California and Montana; his Civil Code was often pressed on the New York Legislature and as often rejected, as was his Political Code, but five other States adopted them both. His influence was not limited to his own country. 'Looking abroad, we find that the Field Procedural Codes prepared the way for the Supreme Court of Judicature Act in 1873 in England; the substantive law codes profoundly influenced the movement for the codification of the law of India, while some of his codes were even adopted in Singapore and Hong Kong.' Nor are his Draft Outlines for a Code of International Law without interest for us today.

To review and commemorate the work of this remarkable man a conference was held in 1948 (the centenary year of the New York Code of Procedure) under the auspices of the School of Law of New York University, and in the present volume are assembled the addresses there delivered by a score of distinguished lawyers, both practising and academic, mostly fellow-countrymen of Field's but including also Lord Chorley, who told of recent movements for procedural reform in England, and Dr. Yuen li Liang of the U.N. Secretariat, who described the steps so far taken by the United Nations under Art. 13 of the Charter to encourage 'the progressive development of international law and its codification'. Other speakers dealt with other aspects of international law (Mr. Justice Jackson spoke on the procedure at the Nuremberg trial), with the codification of substantive law (Judge Herbert F. Goodrich gave some interesting information about the present position of the Restatement and the work of the American Law Institute), and with procedural reform in the civil law countries, but the main emphasis throughout the Conference was placed, naturally, on procedural methods in the United States. In this matter the general consensus was to the effect that, although Field's introduction of a procedural code had been a great advance in its time, the legislative enactment of procedural rules had proved unsatisfactory and a resolution was passed suggesting that New York should vest the rule-making power in the Court of Appeals.

The fact that this is a record of proceedings at a Conference makes for some diffuseness and has led to the inclusion of some matter of no great permanent value (it was hardly necessary to confer the immortality of print on every word of the after-dinner speeches), and also perhaps accounts for some curious (though infrequent) errata which may be stenographer's slips—'proceeded' for 'preceded' (p. 113) and the puzzling 'early income' (p. 118) which should perhaps be 'earned income'. But these are trivial complaints when we consider how much these papers contain of useful information and of critical opinions by experts discussing the systems with which they are familiar. A full Index, Table of Contents, Tables of Cases, Statutes and Rules, and an excellent selective bibliography add to their value. No one interested in procedural methods or in problems of common law codification should neglect this volume.

A. H. Campbell.

Changing Attitudes in Soviet Russia: The Family in the U.S.S.R. Documents and Readings Edited with an Introduction by Rudolf Schlesinger, ph.d. [London: Routledge and Kegan Paul, Ltd. 406 pp. 25s. net.]

This is the first of a number of volumes in which Dr. Schlesinger is to deal with the changing attitudes prevailing in the Soviet Union towards specific aspects of social and political life. Its appeal is to the sociologist or the political scientist rather than to the lawyer as such, and the importance of

its subject-matter has increased since the book was compiled, if only by reason of the fact that as from January 1, 1950, a family code is to be introduced in both Czechoslovakia and Poland based on the 1944 code of the U.S.S.R.—'the master-plan for the Peoples' Democracies'.

The bulk of the book consists of translations from original Soviet documents, including speeches and articles. These refer more specifically to the position of women in the family and in Soviet society than to the family as such, and the emphasis is understandable since, in the years immediately following the Soviet revolution, the women of the U.S.S.R. constituted at once a potential threat to the reception of the ideas of the new Soviet ruling class, and a potential instrument for the propagation and perpetuation of the tenets of the newly-established society once these had been accepted or imposed. They also provided a large reserve pool of labour on which the new society could draw for the achievement of economic plans for capital construction. The preoccupation with the position of women may, however, account for the omission of such items of Soviet law relevant to the family unit as article 58 (1) (*c*) of the R.S.F.S.R. Criminal Code, which provides that in the event of desertion and escape over the Soviet frontiers by a member of the armed forces, all adult members of his family who neither aided and abetted nor knew of the proposed escape shall be liable to loss of civil rights and deportation to Siberia for a period not exceeding five years.

The documents fall clearly into two parts, the watershed corresponding with the 'stabilisation' of the party doctrine. The first period opens with discussions between the revolutionary intelligentsia, including Lenin, on feminism, free love and family responsibilities. The speeches in the second session of the R.S.F.S.R. Central Executive Committee in 1925, by contrast, are emotional rather than intellectual; most of the speakers appear gropingly inexperienced in political affairs. Undisciplined they clearly were and it was a grievous fault; Dr. Schlesinger in a footnote indicates the subsequent fate of some of them.

By 1936 all has changed. Pravda, writing on the conference of the wives of engineers in heavy industry, strikes the new note: 'Everything that is progressive, full of initiative and creativity in the country has been brought here, into the Kremlin. The best sons and daughters of our fatherland have stepped on to its honoured platform and their powerful voices have been broadcast hence to the whole country . . . a conference unimaginable in any other country'. At the conference itself adulation of Stalin is followed by a revealing account of the activities of the activist wives: 'It is true that the builders have come to dislike us. Whenever they saw that car with the wives draw up, they ran for it'. And again: 'we never go to bed until we know whether our factory has worked to schedule or not and . . . if scheduled production has not been reached, we worry our husbands at night: "Why don't you go down to the works and check up once more and find out what has gone wrong—why work is behind schedule?" There follows the thinly-veiled threat: 'Everyone grasped that if she did not assist her husband, not only would she fall behind us, but also behind her husband, who would look round for a more active wife'.

The discussion on and the eventual abolition of legal abortion follow in 1936. Again the party line is adumbrated in a Pravda leader and some opposition to the new proposals is ventilated. Sir John Maynard has pointed out that since family law fell within the competence of the Constituent Republics it was not within the competence of the Council of Peoples' Commissars of the U.S.S.R. to decree the abolition of abortion for the whole of the U.S.S.R.

To the sociologist it must be a matter for profound regret that an experiment of such importance and far-reaching implications as the legalising of abortion should have been ended in an atmosphere precluding independent

factual investigation of all aspects of the practice in the U.S.S.R. The papers which Professor Szerdukov and others read to the First Ukrainian Conference of Gynæcologists in Kiev contain some revealing statistics, but as Dr. Schlesinger points out, this Conference was not of the first importance; the statistics are also fragmentary and the Conference was held nine years before the abolition.

Dr. Schlesinger is obviously in a difficult position. He points out that 'proper assessment of the respective importance of the elements of continuity and change is amongst the most urgent, and most difficult, tasks of the student of Soviet society', but adds, 'the fact that the most radical method of solving certain problems of a given period has resulted in the dropping of some, and the preservation of others, of the traditional institutions, may help us to distinguish, in the system of ideas critical of pre-revolutionary society, what corresponds to the actual needs of the time'. This is sustainable on the assumption that the observer's view of the 'actual needs of the time' corresponds with that of those in power at the relevant periods, or that the highly subjective factor of the requirements of a dominant class is merged in the seemingly neutral phrase of 'the actual needs of the time'. When Dr. Schlesinger goes on to say that 'as a general sociological and political theory it (Marxism) has helped the Russians to establish a society which not only *secures freedom from want* (reviewer's italics) but also removes some contradictions between the conditions of earning a living and the interests of population policy involved in a society based on private property in the means of production', he is making many disputable and, some will think, some untenable assumptions. The fact is that in equating the Marxist with the Socialist society, and the present Soviet society with both, Dr. Schlesinger presents a version of the 'Socialist case' that few 'Western' socialists would attempt to sustain.

Yet the Soviet family code of 1944 and even more the abolition of co-education in 1943 and the reasons given for it, cause the learned editor some perplexity. The overt overriding consideration is, of course, the need to replenish the population after the war losses of 1941–45, which Dr. Schlesinger places at fifteen million. Stalin in his speech of May 9, 1946, gave a figure of seven million dead; assuming this to be approximately correct, a total of fifteen million lost to the productive potential appears excessive.

It is, however, significant that to accomplish this object the Soviet Government has jettisoned not only the education of women in the same establishments as men, but has stated specifically that 'what we must have now is a system by which the school develops girls who will be intelligent mothers competent to rear the new generation', and Dr. Schlesinger is understandably disturbed at the possible implications of such a development, which can only lead to a deterioration in the status of women in Soviet society as a whole.

It should also be borne in mind that the decision on what constitutes defensive or reconstructive population increase in contrast with aggressive expansionary increase will be made in the U.S.S.R. by those in power, without opportunity for opposition and on the basis of undisclosed information. Statistics on the birthrate and natural increase which in the West are published, analysed and exhaustively debated come in the U.S.S.R. within the category of State secrets; no complete figures are available apart from the census figures of 1926 and 1939, the census taken in 1936 having been suppressed.

In existing circumstances a case may be made out for the 'rationalisation' of the family by inducements, such as are contained in the 1944 code, to those making a career of motherhood to increase the size of their families, but Dr. Schlesinger certainly overrates the generosity of the children's allowances by referring to 'the huge sums received on the birth and during the early years of younger children', from which he concludes the mother may gain some thousands of roubles in her savings bank account. The lump sums

received at birth are certainly substantial, ranging from 1,300 for the fourth to 5,000 roubles for the eleventh and each subsequent child, but the monthly sums received range from 80 roubles for the fourth to 300 roubles for the eleventh and subsequent children, and these all cease at the fifth birthday. From these sums the mother must expect to support herself as well as the child. The monthly wage for an unskilled worker in the Moscow region is about 350 roubles a month; a chief mining engineer receives about 4,000 roubles. In more remote districts wages may be much higher, but there appears to be no regional differentiation on family allowances.

The attitude to the family in Soviet Russia changed decisively, it may be repeated, between 1926 and 1936. Early post-revolutionary legislation provided for both the education and the enfranchisement of Soviet women, whilst the State intervened by providing creches, factory meals, and other amenities to reduce the irrational drudgery of primitive homes and thus release women's labour for industrial production. Although information is incomplete, it seems probable that the loosening of family ties led to a degree of irresponsibility, particularly in the practice of abortion, that threatened the stability of the new society and the health of the present and future generations. From 1936 this trend was reversed, in particular by the abolition of abortion and the agitation against *de facto* marriages. During the war the reversal of the previous trend was strengthened to provide (a) for a special form of education for women, (b) for new legislation placing divorce beyond the financial resources of most of the population, and (c) for family allowances which meant that the unmarried mother and the married mother of the larger family became dependent for the support of herself and her children not on their father, but directly upon the State. This also may have far-reaching implications.

The Law of Nations: An Introduction to the International Law of Peace. By J. L. Brierly. Fourth Edition. [Oxford: Clarendon Press. 1949. 306 pp. 8s. 6d.]

It is a pleasure to be able to announce the publication of the fourth edition of this admirable and beautifully written little book. It has become firmly established as a stimulating introduction to international law, and the new edition, slightly enlarged and considerably enriched in many respects, will no doubt be greatly welcomed by those for whom it is primarily intended, *viz.*, students as well as laymen interested in the effect of law upon the relations of States. But the outstanding feature of this book has always been that it contains so much that is of value to the expert. Professor Brierly's mature views, his wise restraint and his frequently caustic comment make this 'introduction' much more than it pretends to be. In fact every international lawyer will derive much help and guidance from Professor Brierly's work.

In the Preface he proclaims his belief that international law 'is neither a myth on the one hand, nor a panacea on the other, but just one institution among others which we can use for the building of a saner international order'. This attitude of mind pervades the whole book, and in particular the chapter on 'The character of the modern system', where, *e.g.*, the learned author firmly puts the horse before the cart by saying: 'It is not the existence of a police force that makes a system of law strong and respected, but the strength of the law that makes it possible for a police force to be effectively organised' (p. 73). It is interesting to observe that Professor Brierly cannot conceal a certain preference for the League of Nations and a certain scepticism for the United Nations of whose system of International Trusteeship, for instance, he says that some of its objectives 'are of the type of pious platitudes in which the Charter abounds' (pp. 153, 154). It is satisfactory to have his authority for the view that 'it can hardly be said that

international law requires immunity to be extended to public ships engaged in ordinary commercial undertakings' (p. 179). The learned author suggests that 'at the present time there appears to be no instance of a relation between States which is described as a suzerainty'; could not the present position of Germany be so described? At p. 218 a reference to *Joyce's Case* would perhaps have assisted the student. The short, but illuminating discussion of the *clausula rebus sic stantibus* (pp. 244–249) is a particularly impressive example of the author's happy manner of exposition which characterises this work.

F. A. Mann.

International Law. Vol. 1: International Courts. By G. Schwarzenberger, ph.d., dr.jur. Second Edition. [London: Stevens & Sons, Ltd. 1949. liv and 681 pp. £3 10s.]

Writing in 1946 of the first edition of this book Dr. Clive Parry said 'It is a misfortune that Volume I shall have appeared alone. This circumstance makes it peculiarly difficult to be fair to Dr. Schwarzenberger or to be helpfully critical'. This is still true. It is a pity that the second and third volumes should not have taken precedence over the re-editing of the first, the more so as the changes are not extensive.

The principal changes in the present edition can be briefly noted. Firstly, there is a more extended explanation of the inductive approach to International Law. Dr. Schwarzenberger rightly notes that the deductive method was inevitably used in the earliest attempts to treat International Law as a subject of scientific study—but he continues 'the deductive treatment characteristic of scholasticism was no less taken for granted by exponents of the Common Law'. A letter by Bacon is cited as authority. Coke would have had a reply to that.

In Chapter 2 there is a new and elaborate analysis of Article 38 of the Statute of the I. C. J. The article, it seems, deals not only with sources of International Law—conventions, customs and general principles in that order, but also with law-determining agencies—States, courts, writings in that order. If there is unity among the elements of these agencies no difficulty arises, for the order of precedence is prescribed. However, States, courts, writers may disagree. It is, therefore, necessary to conduct 'a hierarchy of the elements of law-determining agencies' which must be graded, not in relation to the agencies of which they are elements, but according to their reactions to tests for bias, International outlook, and technical standards. This is painstakingly done. It is an opportunity for Dr. Schwarzenberger to reassert his mistrust of eclectic text writings. The practical utility of such a hierarchy is hard to see.

The Nuremburg trial provides a new chapter which is prefaced by an interesting account of the trial of Sir Peter of Hagenbach in 1474. The temptation to regard the Nuremburg decisions as precedents in International Law is very fairly resisted. It may well be doubted if legal analysis of such occasions can do more than provide *ex post facto* justification for what must always in the nature of things depend on executive policy at the time.

The last addition of importance to the text is the *Corfu Case*—Preliminary Objection and Merits. The case is given full weight for, as a consequence of the author's method, it appears in numerous places in the book. However, at p. 228 it is said of the two separate and successive acts that 'they were the equivalent of a special agreement on the submission of the case to the International Court of Justice'—this ignores the procedural difference between cases initiated by compromis and cases begun by application. In fact, in the *Corfu Case*, certain rules formerly relevant only to cases begun by application were employed by the court (see *Yale Law Journal*, December, 1948, p. 187).

The second edition contains a selected bibliography and a synoptic presentation of the Statute and Rules of the old and new World courts.

G. D. G. Hall.

Annual Digest and Reports of Public International Law Cases, 1943–1945. Edited by H. Lauterpacht, ll.d., f.b.a. [London : Butterworth & Co., Ltd. 1949. xxxii and 584 pp. 55s. net.]

This is the twelfth volume of the *Annual Digest,* and will be of much value to teachers of international law and to those students who read footnotes as well as text. The decisions are those of national tribunals only—inevitable at such a time—and arise in large part directly or indirectly from the War. It is not possible to do more than comment on a few isolated parts.

Exemption from and restrictions upon jurisdiction are covered in three sub-headings: foreign States, public ships and other property of foreign States, foreign armed forces. Under this last rubric appears, naturally, *Wright* v. *Cantrell* (p. 133) and, surprisingly, *Republic of Mexico* v. *Hoffman* (p. 143). This latter case has been called elsewhere by the editor of the Digest 'a somewhat drastic affirmation by the Supreme Court of the right of the executive department to determine the question of immunity'. The attitude of the U.S. Supreme Court was that the courts should not deny an immunity which government has seen fit to allow, nor allow an immunity which government has not seen fit to recognise. In this way (Frankfurter J.) responsibility will be placed where power lies. The case may usefully be compared with *Mexico* v. *Schmuck* (p. 75) where the Court of Appeals of New York echoed the desire of the Supreme Court to refrain from embarrassing the executive, and said, 'We find that, in this case, though the Supreme Court of the State must relinquish its jurisdiction to determine those questions which have been authoritatively determined by the Department of State, the court still retains a jurisdiction limited to the determination of the question, left open by the Department of State, whether the Sovereign State of Mexico has consented that its agency Petroleos Mexicanos may be sued in this State'. The cases are of interest for two reasons. Firstly they afford material for a comparison of the conclusiveness of the American Suggestion and the Foreign Office Certificate (see the articles by Lyons in B.Y.I.L. 1946 and 1947). Secondly, because *Krajina* v. *Tass Agency* [1949] 2 All E.R. 274, has recently raised the whole question of the distinction between *actes de gestion* and *actes de pouvoir,* which is instanced in this volume by *Egyptian Delta Rice Mills Co.* v. *Comisaria General* (p. 103), but has had no place in English jurisprudence as a result of *The Parlement Belge* (1880) 5 P.D. 197, as interpreted in *The Porto Alexandre* [1920] P. 30—see especially, *per* Singleton L.J. [1949] 2 All E.R. at p. 284.

There are two echoes of the *Sovfracht Case* [1943] A.C. 203. In *Compagnie Française de l'Afrique Occidentale* v. *The Otho* (p. 332), a libel was brought by British underwriters in the name of a company which was domiciled in German-occupied France, and to whose rights resulting from a collision with the *Otho* the underwriters had been subrogated after payment by them of substantial insurance. Motion to stay the trial was denied by the U.S. District Court, Southern District of New York, on the ground that judgment if recovered could in no wise assist the enemy, the 'enemy corporation' having long since been compensated. A comparison with the *Sovfracht Case* shows that, while the majority of the House of Lords regarded the particular facts of that case as important ('such an asset might well operate as security for an advance to the enemy from a neutral lender', *per* Viscount Simon L.C. at p. 212), yet Lord Porter said (at p. 251) 'the question, however, whether a

given act is against public policy must I think be decided on general principles. It is not permissible to say that a particular act will not in fact assist the enemy'. The distinction may, however, be merely verbal—if there are enough 'general principles' then every decision can be made 'on the particular facts'.

Anglo-Czechoslovak and Prague Credit Bank v. *Janssen* (p. 43) might have been shortly dismissed as a case of enemy alien at common law (Czech bank in German-occupied Czechoslovakia) attempting to sue without a royal licence ([1943] A.C. at p. 12): but the Supreme Court of Victoria chose to discuss at some length the appropriate judicial attitude to executive statements on *de facto* and *de jure* recognition, and was of opinion that, where no present invasion or civil war obscured judicial vision, the court might properly take notice of evidence other than that provided by the executive. The Supreme Court relied for this upon dicta of Lord Wright in the *Sovfracht Case* (oddly referred to as *Re an Arbitration*) at p. 229, where he states that German occupation of Holland has been assumed as 'matter of common notoriety'. But Lord Wright had noted that 'it might have been better if an application had been made for information to the Foreign Office'. In the Victorian case an application of this nature had in fact been made, but the Supreme Court had little liking for the reply.

At p. 55 of the Digest appears a heading 'Sovereignty over the Air'. Under this heading there is one case. It is *Polpen Shipping Co., Ltd.* v. *Commercial Union Assurance Co., Ltd.*, 74 Ll.L.R. 157. This was a decision by Atkinson J. that a flying boat was not a 'ship or vessel' for the purpose of a running-down clause in a policy of marine insurance. To arrive at his conclusion Atkinson J. referred to the Merchant Shipping Act, 1894, and the Air Navigation Acts, 1920 and 1936. Is that a ground for the inclusion of this case in a Digest of Public International Law? The same comment might be made of some of the cases on nationality which appear to be of municipal interest and concerned mainly with statutory interpretation. In his desire to further the completeness and equitable nature of the rules of international law Professor Lauterpacht has set a noble example—but it is submitted that the inclusion of these cases is on a level with the conjuring of a doctrine of abuse of rights from The Case of German Interests in Polish Upper Silesia A. 7—more illustrative of valour than discretion.

G. D. G. Hall.

THE BELSEN TRIAL. Edited by R. Phillips. War Crimes Trials Series, Vol. 2. [London: Hodge & Co. 1949. xlviii and 749 pp. 83 photographs and 1 map. 30s.]

During May, 1949, various members of the House of Lords, both lay and spiritual, called for the ending of all war crimes trials, a review of all sentences already awarded as a result of such trials, and an early amnesty for all accused of war crimes. In his Preface to *The Belsen Trial* Lord Jowitt says it should be 'widely read', and it is submitted that had some of the noble peers merely looked at the gruesome photographs here reproduced, there would have been less sentimental emotionalism on behalf of war criminals in the various speeches. One of the complaints that has recently been made is that a long time has now elapsed since the termination of hostilities, and elderly 'gentlemen' should not be called upon to stand trial for their lives five or six years after the crime is alleged to have been committed. It would be interesting to know whether similar sentiments would be expressed if the accused were charged under English law with the murder of only one young child, and the police had not secured sufficient evidence to bring a case against him until some five or six years had passed. A comment made by the Judge Advocate in this case in answer to those who criticised the length of

the Belsen trial—fifty-four days—is equally relevant to the present campaign. 'In the long view, time was relatively unimportant, it was justice that counted' (p. 640). Surely, justice to the victim is at least as important as justice to the accused murderer.

Before the publication of *The Belsen Trial* there had already been two volumes of the War Crimes Trials Series issued, and in each case the editing of the volume left little to be desired. Unfortunately, this cannot be said of *The Belsen Trial.* In a trial that lasted as long as this did, editing is difficult and must be executed with care, for the volume would be of inordinate length if an attempt were made to reproduce a truly verbatim report. Although forty-five prisoners were in the dock during this trial, no attempt has been made, by way of appendix or otherwise, to provide any means of pursuing or checking the various accusations against any particular prisoner. The editor is himself aware of this difficulty, for he points out that 'the evidence concerning a particular accused is often scattered throughout the trial; and at times one is almost confronted with the spectacle of a trial within a trial whilst particular matters are being dealt with which only affect certain accused' (p. xxxviii). Nevertheless, he did not consider it necessary to provide an Index to assist the reader to unravel this confusion. In order to reduce the size of the account, Mr. Phillips has often changed the form of evidence by live witnesses from that of question and answer to a continuous account. This may save space, and may even be conducive to easy reading, but it does not adequately permit one to discover how far leading questions were admitted. Similarly, it is to be regretted that he omits all objections made by either side to the admissibility of evidence. The learned editor is, however, to be thanked for providing a bookmark that gives the names of the accused and their counsel, and provides a translation of many of the German terms used during the proceedings.

The accused were defended by twelve legally qualified military officers, one of whom was a Pole who was responsible for defending six former Polish internees who had become members of the camp staff. In addition, Professor H. A. Smith, who was then attached to the legal staff of 21st Army Group, appeared on behalf of all the accused to make their defence in the light of international law. It is important, however, to remember that Professor Smith appeared as a defending officer and not as a professor of international law. As Colonel Backhouse, the prosecutor, pointed out, it was the function of the Judge Advocate to explain the law—even international law—to the court, for 'I have not the slightest objection to anybody acting as defending officer putting forward whatever views on the law he likes to which I will be in a position to reply, and it will then be for the Judge Advocate to advise the court' (p. 104). Despite the importance of the legal arguments in this particular case, even Professor Smith's address has been edited and it is most disconcerting to read references by him, or by the prosecutor or other defending officers, to statements he had made in his speech, but which are not reproduced in the text printed in *The Belsen Trial.*

Enough is known of what ensued at Belsen and in the gas chambers at Auschwitz to enable us to pass over the actual evidence produced at the trial. It is sufficient to say that this trial provides ample evidence of the depths of depravity to which the hirelings of the Nazi system had fallen, and illustrates the cowardice that is really inherent in the bully, a cowardice that constantly leads to mutual accusations and contradictory denials.

English lawyers frequently criticise the loose rules of evidence that govern trials of war criminals. More than 130 affidavits, depositions and written statements, not all of which were signed or sworn, were admitted. The defending officers constantly attacked their use, particularly when a live witness omitted to include in his testimony incidents that had been mentioned in his earlier statement, or if new incidents were reported which had not been recorded in the original declaration. They especially delighted in pointing

out discrepancies in dates. It is submitted that in their attitude to these statements the defending officers demonstrated a complete ignorance of the mentality of a person who has been a prisoner for a prolonged period of time and of the method of taking statements from such persons. In a prison camp without calendars it is impossible to be sure of the date, often there is even vagueness as to the year. In the early days of release there is frequently a tendency to report only the most outstanding events, and this is certainly not surprising with a prisoner for whom cruelty and violence have become part of the daily round. In addition, interrogation officers frequently stimulate the memory by asking whether the deponent has anything to say about a particular person, and such a suggestion is often enough temporarily to awaken a mind that may be affected by disease and violence. Furthermore, trained military lawyers should have known better than to attempt to impugn sworn statements made by witnesses, when they had failed to challenge such witnesses with these statements.

Professor Smith based his argument on the thesis that 'the punishment of war crimes is a means of securing legitimate warfare and nothing else' (p. 493). To accept such a contention would mean that no war criminal could be tried after the termination of hostilities, and would tend to make nonsense of the war crime involved in, for example, scuttling U-boats after an armistice had been signed. In accordance with this thesis he contended that the concentration camp policy had nothing to do with the war, for the camps were instituted in 1933 and all that happened was that 'as soon as the Germans overran some territory, east or west, . . . they at once put into effect in that territory their racial policy' (p. 494). This is to deprive that part of Hague Convention IV which relates to the occupation of enemy territory of all meaning, and enables an accused war criminal to defend any action in such territory, however outrageous it may be, on the grounds that it was consonant with national policy and municipal law. Furthermore, as the prosecutor pointed out, the Allied personnel who were ill-treated were captured only because of and during the war, and German policy before or after the war was, therefore, irrelevant (pp. 586–8). All the defending officers, and not Professor Smith alone, made much of the fact that concentration camps and gas chambers were legal by German law, and 'wherever there is a conflict between international law and the law of a particular country, it is the duty of the citizen of that country to obey his national law' (p. 498). This may be true for a German court, but it ignores the fact that the court trying the Belsen case was a British military tribunal applying international law, and the only system of municipal law that might be of importance for that court was English law. Many of the victims of Auschwitz and Belsen were Poles and Czechs, and Professor Smith argued that atrocities against them could not be considered as war crimes as, from the standpoint of German law, these territories had become part of Germany and German law was the local law, so that these territories were no longer under military occupation. There is no similar suggestion made in the case of the Low Countries, France, Luxembourg or Jersey, and it ignores the principle that there can be no change in territorial sovereignty so long as the war continues, even though the local army surrenders and the fight is continued by allies. So long ago as 1930, Professor Baty remarked that 'hostile occupation acts as a sterilising medium to preserve the *status quo*' (*The Canons of International Law*, p. 480).

During their closing addresses some of the defending officers referred to the medical experiments that were carried out at Auschwitz. Apparently, 'some of the most famous (German) doctors had taken part in them, and no knowledge at all was available of what their value to humanity as a whole had been' (p. 513). It would be interesting to know what has happened to these 'famous' doctors, and whether the sentimentalists in the House of Lords desire to see them included in the amnesty.

Major Winwood and Major Cranfield both drew the court's attention to

the horrors that the witnesses had been subjected to, and pointed out that it was very likely that many incidents of a trivial character had been telescoped together to produce one of a grave nature, while it was not impossible that many of the witnesses, unable to find the person who had actually ill-treated them, were determined now 'that the tables had been turned . . . to pin the incident on one of the people in custody'. They therefore called upon the court to 'be very careful . . . not to confuse fact with fantasy' (pp. 520, 537). Anyone reading this account of the Belsen trial must be impressed by the scrupulously fair trial that was enjoyed by the accused, of whom fourteen were acquitted and only eleven sentenced to death. Perhaps the greatest justification for the trial and the verdict is to be found in the affidavit of Dr. Klein, one of those who paid the supreme penalty: 'I told Kramer, had I been the English officer taking the camp over, I would have taken the Kommandant and the doctor, put them against the wall and shot them' (p. 717).

London. Leslie C. Green.

Clerk and Lindsell on the Law of Torts. Tenth Edition under the general editorship of Harold Potter, ll.d., Professor of English Law in the University of London, King's College; editors—Sir Charles Odgers, b.a., b.c.l., J. Charlesworth, ll.d., K. E. Shelley, k.c., and John Burke. [London: Sweet & Maxwell, Ltd. 1947. cxliv and 1052 pp. £3 10s.]

It is somewhat difficult to assess *Clerk and Lindsell* at the end of sixty years existence. Time was when its prestige was second only to Pollock: then Beven on many of the more controversial topics leapt into the lead: finally came Salmond, Stallybrass and Winfield, midgets in point of volume but giants in point of authority. The law reports today bristle with references and approvals of the last two books, but citations by the Bench from *Clerk and Lindsell* are comparatively rare.

Perhaps it is that the book is too big. In 1889 most law books of repute tended to be mammoths, but their very size militated severely against their chance of survival. Today we have grown accustomed to forego the detailed examination of each important case with which Beven, for example, regaled us, and have learnt to content us with terse statements of principles, illustrated with apposite examples and qualified as need may be by various riders and provisos. This trend has turned Salmond and Winfield into what may be called the court books to be cited as summarising the law, while *Clerk and Lindsell* has been more and more relegated to chambers as a tool to be used in the preparation of a case. In some ways this is a pity, because a great deal of the matter is extraordinarily good and could be used with great advantage if there were not so much bulk to carry around for the sake of the two or three pages required. From the practitioner's point of view it would certainly assist if the book were split up into three or four separate volumes dealing with separate topics (*pace*, of course, those who maintain that the addition of the 's' to the word 'Tort' in the title is a mediaeval survival!): this would give the added advantage that only those sections where development is vigorous and rapid would need to be revised and reprinted with any frequency, the more static topics such as assault, seduction, distress and the like being brushed up every twenty-five years or so. Meanwhile, however, let us take heart from the fact that the institution of supplements will save our pockets the large outlay for the whole book every eight or nine years as heretofore.

The foregoing remarks are not intended in any way to suggest that this

new edition is untimely—far from it. Since 1937 the legal development in many tort topics—negligence and breach of statutory duty in particular—has been enormous, and vigorous recasting and rewriting of the ninth edition was undoubtedly called for. And it has been done with a thoroughness and care which is beyond praise. An entirely new chapter is contributed by Professor Potter on 'Liability in connection with statute'—somewhat overdue from the practitioner's point of view, but all the more welcome now for that very reason. The lack of clarity on this extremely important topic is well illustrated by the fact that one of Professor Potter's main pegs is a dissenting judgment of Lord Atkin,[1] but there can be no doubt that this is justified. When driven to dissent, Lord Atkin was always more conscientious than ever in framing his propositions of law in a form from which no dissent is possible. The only complaint which may perhaps be levelled at the chapter is on the score of arrangement: instead of meeting it at the very end of the book after the dissertations on copyright, patents and trade marks, one would have liked it right next door to the chapter on negligence. Indeed, some of us make bold to assert that breach of statutory duty really is negligence, being a breach of a duty as defined by law to take care in relation to other people's lives, limbs and property: the fact that the standard of care required is absolute or strict, instead of merely reasonable, being neither here nor there as far as legal definition is concerned.

Professor Potter also keeps in his own hands the subject of negligence, and has largely recast and rewritten his analysis of the duty of care. There is no doubt that he has wrought a great improvement. There have, of course, been many signposts, in the House of Lords and elsewhere, since 1937 on the general extent and content of the subject, but not all of them have been found to fit comfortably with earlier decisions and dicta. *Glasgow Corporation* v. *Muir* [1943] A.C. 448, fluttered no dovecotes, but the same can hardly be said of *Bourhill* v. *Young* at p. 92 of the same volume. Like his fellow contributor Dr. Charlesworth in another place, Professor Potter seems to find it, if not a camel, at any rate a somewhat hairy gnat: his statement (at p. 351) that 'properly *Hambrook* v. *Stokes* is a case on remoteness of damage and *Bourhill* v. *Young* on the duty of care' is very difficult to reconcile with his later statement (at p. 352) that 'if in a general way we may say that there is a duty of care existing, as in the case of users of a highway, the duty is only to take care against a reasonably foreseeable harm'. After all, if harm in fact suffered was not reasonably foreseeable so as to negative the duty, one never begins to get to the topic of remoteness of damage at all: indeed, there is no such topic, because the answer to the question 'was there or was there not a breach of the duty applicable in the circumstances?' has already cut away the only roots it can have. The answer, as some of us venture to think, is that unnecessary difficulties were introduced into the whole subject when the Victorian lawyers, with their craving for logical systematisation, sought to tie up the whole subject with a neat piece of tape called causation. To them, judging from their pronouncements in the reports, causation was as simple and clear cut as Paley's evidences: we, no doubt in our over-sophistication, find the whole conception rather elusive and in many instances valid only in a metaphorical sense. If, for the question 'did A's act or omission cause the harm complained of?', we pose the question 'is it fair and reasonable to blame A for the harm complained of?', many of the problems would be a good deal easier to answer although some of the architectural symmetry of the law would have to be sacrificed.

It is quite needless to say that everyone interested in the subject should read Professor Potter's chapter. Whether they agree or not with his conclusions, they cannot help but respect his acumen and delight in the sustained

[1] *East Suffolk Catchment Board* v. *Kent*, [1941] A.C. 74.

interest which he maintains. Some of us would, however, welcome many more references to discussions of controversial topics in the learned journals. It is long out of date to suppose that practitioners have never heard of, or disdain to look at, *The Law Quarterly Review, The Cambridge Law Journal* or *The Modern Law Review.* Some of us would also like to see Scots cases cited correctly: it is rather late in the day to see McAlister (or Donoghue) and Hay (or Bourhill) still rearing their ugly heads.

Another chapter, again by Professor Potter, which everyone should read is the first one of all on the principles of liability. It is called introductory, but is about as introductory as any other essay in jurisprudence: it really is a philosophical summary of the topic, derived from sustained attention to the detail and intelligible only to those with a pretty comprehensive knowledge of the subject. It has very properly and rightly been published separately because it is too good and too original to be buried in a practitioner's encyclopædia. It is impossible to attempt to summarise it and to cite extracts, though appetising, would probably be misleading. My advice is—read it.

I seem to have concentrated entirely on contributions by Professor Potter, but this is merely because the topics he has dealt with are those which appeal to me personally the most. It must not, however, be thought that I have not read, or intend to decry, the performances of his distinguished coadjutators. The work of revision and incorporating new decisions and cutting out old and dead or dying wood has been painstakingly and accurately carried out, and one can safely say, not only that *Clerk and Lindsell* has taken a new lease of life, but has gone a long way towards regaining its old prestige. For practitioners it has always been an indispensable book: it is now more than ever a readable and reliable book too.

Stephen Chapman.

Outlines of Law for Social Workers. By A. C. L. Morrison, c.b.e. and E. L. Thackray, ll.m. [London: Butterworth & Co. (Publishers), Ltd. 1948. vii, 323 and 26 pp. 10s. 6d.]

I imagine that social workers must frequently be asked legal questions of a simple kind, and this must be embarrassing because failure to answer them must often lead to a certain loss of prestige. Unless the worker has some knowledge of the law he can only refer the question to a poor man's lawyer, or relying on his common sense, a risky business even with what may appear to be very simple problems, he must guess the answer. The authors of this book attempt to arm him against this difficulty by providing a number of short statements on a number of branches of the law which are likely to impinge on the life of an ordinary low-income citizen. In the hands of a sensible social worker who is prepared at the slightest feeling of uncertainty to refer the question to a lawyer the book should prove of great value, but he must certainly exercise great caution.

Some twenty topics, from accidents to wills, are treated; all civil in character. It is a little surprising that in a work for which Mr. Morrison is partly responsible—his high reputation as chief clerk at Bow Street is well known—no attempt should have been made to deal with any of the simple criminal problems. In my own experience such crimes as assaults, bigamous marriages, obstructions, etc., loom fairly large in the lives of dwellers in poor districts where there is also, of course, a good deal of crime of a more serious kind. No doubt Mr. Thackray's experience at the Cambridge House Legal Advice Centre was of great value in coming to a decision as to the topics to be dealt with, but it seems rather curious to find that some of the social services are excluded, *e.g.*, pensions, because they are

covered by the National Council of Social Services 'Citizen Advice Notes' while social insurance, family allowances, the health service are dealt with together in this work in one of the longest chapters it contains. While the majority of the subjects are dealt with by Messrs. Morrison and Thackray there are a number of other authors of individual chapters, for example, Mr. A. N. Murdoch who had considerable experience of handling naturalisation cases at the Home Office writes on Naturalisation and British Nationality.

The chapters are written in clear, straightforward, non-technical language. The law is as far as I have been able to judge stated with reasonable accuracy, that is to say, without the small qualifications which are often required for a completely accurate statement, but which tend to confuse the mind of the lay reader. Sometimes this may lead to a misstatement which will upset a legal reader but which is very unlikely to do any harm in practice, *e.g.*, the carrier's liability is rested on negligence whereas it is possible that he may be under the obligations of a common carrier. Again the owner of a vicious animal is not liable in negligence but that hardly matters to the social worker for whom the main point to grasp is the *scienter* which is clearly brought out. Some of the chapters go into much more detail than a social worker is likely to require, and may indeed prove dangerous by tempting him to undertake jobs which can only be competently performed by the professional. The chapter on wills and intestacies, for example, goes into the matter at some length, and nowhere as far as I have been able to find warns the reader of the extreme danger which anyone runs who drafts a will without competent legal advice. And does a social worker really need to know that the death duty on an estate between one and two million pounds is 70 per cent?

C.

Cases on Criminal Law. By Rupert Cross, m.a., b.c.l., and P. Asterley Jones, ll.b., m.p. [London : Butterworth & Co. 1949. xxx and 303 pp. 17s. 6d.]

This digest of more than 100 leading criminal cases is intended as a companion volume to the same authors' 'Introduction to the Criminal Law' previously reviewed here. Any selection of leading cases must of necessity reflect to some extent the personal preferences of the compilers, but this volume represents fairly, in comparatively narrow limits, the whole field of criminal law. Messrs. Cross and Jones must be congratulated on the care and skill with which they have excecuted their task.

In welcoming this new collection of cases a general reservation must, however, be made which applies to the whole *genus* and not specifically to the book now before us. Although for practical reasons case-books of this kind have always been indispensable tools for students, there is an inherent danger that they may occupy an undue place in legal studies. The main aim of teaching in the common law must be to attract the student to the sources of the law, the cases decided by the courts as reported in the various series of law reports, and teachers as well as textbooks must guide him through their formidable and ever-increasing bulk. Collections of leading cases are no substitute for study in the library, but being more handy and easily accessible, they tend to keep the student away from the law reports. There is a risk that an outline of the facts and the salient parts of a judgment, which such digests provide, will be taken for the whole and the full development of the argument, as well as dissenting judgments, though frequently no less instructive, will go by the board.

If these dangers are appreciated, as undoubtedly they are at the Universities, and collections of cases like the present one are used as handy means for refreshing the memory and not as substitutes for the law reports, they can be stimulating to students. When they deal with a branch of law such as the criminal law, where legislation has made inroads on the common law, their value would be substantially increased if major statutory provisions on which subsequent case-law has been built were set out in full. Thus, to readers of *Cross and Jones* the text of the Larceny Act, 1916, to mention only the most important, would no doubt be welcome, and it is suggested that this might take the place of one of the general notes attached to the relevant section of the cases some of which, though highly interesting in themselves, look in their context a little like afterthoughts to the *Introduction.* A minor point which would deserve attention in the next edition is the Table of Cases. It opens '*Abramovitch's Case.* See *R.* v. *Abramovitch*', but one should have thought that even a raw beginner might be capable of solving this and similar problems of identification. Finally, at the time of the Achilli trouble, Newman was, of course, not yet a Cardinal, as seems suggested on p. 258.

The test of any collection of leading cases is the accuracy and care with which the inevitable condensation of judgments has been carried out. This test *Cross and Jones* passes with flying colours; the *Cases on Criminal Law* maintain the high standard set by the textbook.

H. A. Hammelmann.

Deductions Under the Income War Tax Act: A Return to Business Principles. By F. E. La Brie and J. R. Westlake, of the University School of Law, Toronto. [Toronto: University of Toronto Press. 1948. 117 pp. (and index). $2.75.]

In Canada, as to a lesser degree in this country, both businessman and lawyer have been increasingly complaining of the growing divorce between the commercial and accountancy principles governing the computation of trading profits and those principles which have been evolved by the courts as stemming from the relevant statutory rules. The authors of this interesting work endeavour to show where and how the Canadian Judiciary has gone astray; since the proof depends, to a great extent, on the decisions of English courts—forty-three of the seventy-six cases cited arose under the British Income Tax Acts—the book should be of no little help to the tax practitioner in this country.

The concept of 'net' income for taxation purposes is the same in Canada as in this country, while the rules as to non-permissible deductions are strikingly alike, though a slight difference in wording has caused the divergence in approach referred to above. Section 6 (1) (*a*) of the late Canadian Income War Tax Act (R. S. C., 1927, c. 97, as amended) enacted that: 'In computing the amount of profits or gains to be assessed, a deduction shall not be allowed in respect of: (*a*) disbursements or expenses not *wholly, exclusively or necessarily* laid out or expended *for the purpose of earning the income* . . .". With this the authors contrast the corresponding provision in the British Income Tax Code, namely rule 3 (*a*), rules relating to Cases I and II, Schedule 'D', Income Tax Act, 1918, which prohibits the deduction in computing business profits of 'any disbursements or expenses not being money *wholly or exclusively* laid out or expended *for the purposes of the trade*'. It will be at once observed how much more restrictive is the wording of the Canadian Act with its imperative 'necessarily'—so reminiscent of similar wording in our rule 9 of Schedule 'E' relating to income from employments with its very circumscribed interpretation by the courts, cf. *Ricketts* v.

Colquhoun [1926] A.C. 1—and also its emphasis on 'earning the income' rather than on the much more general 'purposes of the trade' in our Act.

In the second chapter of the book, the authors show how the Canadian courts have used our cases as a guide in interpreting their Act; where an English decision refuses an allowance it is deemed authoritative, but not so where an expense is allowed for then the Canadian courts reject the analogy on the ground that the British Act is not so restrictive in its prohibition, cf. *Siscoe Gold Mines* v. *Minister of National Finance* (1945) C.T.C. 397, 403. Another reason why Canadian courts do not always follow decisions of our courts is that these latter can only deal with questions of law, for 'conclusions of fact' come to by the Appeal Commissioners are sacrosanct save on the grounds of 'no evidence', see section 149 (1) (*a*), Income Tax Act, 1918, and cases cited on rule 3 (*a*), *supra,* in '"Fact" or "Law" in Cases Stated Under the Income Tax Acts', 62 L.Q.R. 261–3. In Canada, on the contrary, the courts are seized in revenue cases with jurisdiction over questions of fact as well as of law. The authors suggest that under English law two questions normally arise, *viz.,* whether an expense is expressly prohibited by the statute and, if it is not, whether it is a proper 'debit' item in the accounts; the first question they state, erroneously it is submitted, to be a question of fact and the second one of law.

Chapter III is the most useful to the English practitioner for it is devoted to an examination of the principles as to the admissibility of business expenses under our Income Tax code, and the authors bring great acumen to their exploration of our cases. They consider that the cases dealing with the exclusion of expenditure as 'not a proper debit item' fall under two heads, (a) as being too remote from trade purposes, and (b) as being of a capital nature; they allege that these principles are inherent in the 'common law' of taxation which the statutory rules merely restate. This ignores the fact that these statutory rules can be traced back in unbroken lineage and almost unaltered language to the Income Tax Acts of 1803 and 1805, and that the principles evolved by the courts have been deduced from these statutory rules and not *vice versa* as, say, in the case of the Bills of Exchange Act, 1882.

The next two chapters are devoted to the purely Canadian law of income tax, though even there the authors draw heavily on British cases. In Chapter IV—'Origin and Development of the Income Earning Process in Canadian Law', the authors show how, in purported reliance on English decisions, the courts have held that an expense can be deducted only if made 'wholly exclusively and necessarily *in the income earning process from which the income was derived'* and they deal at length with the leading case of *Dominion Natural Gas Co.* v. *Minister of National Revenue* (1940) C.T.C. 155; it is alleged that this principle of the 'income earning process' is at variance with both commercial and accountancy principles and that, if carried to its logical conclusion, it would involve the disallowance of normal revenue expenditure such as advertising or auditing. In Chapter V—'Aspects of the Income Earning Process Concept in Canadian Law'—the authors deal with the 'inconsistencies, contradictions and unfairness' of Canadian decisions, especially with reference to capital expenditure which is prohibited under the Canadian War Tax Act (section 6 (1) (*b*)) in terms very similar to those in the British Income Tax Code. It would seem that the Canadian courts approach the question of capital expenditure through section 6 (1) (*a*), cf. *supra,* rather than under section 6 (1) (*b*), with the result that expenditure (legal expenses) admitted to be only *to preserve* an existing asset has been refused an allowance (*Dominion Natural Gas Co.* v. *Minister of National Revenue* (1940) C.T.C. 155), though a similar expense has been allowed by the courts in this country, cf. *Southern* v. *Borax Consolidated, Ltd.* [1941] 1 K.B. 111. The authors claim that the effect of the decisions under the Canadian Act has been to allow the taxpayer to deduct expenses which increase his incomings but not those which reduce his outgoings since these

latter are not regarded as having been incurred 'wholly, exclusively and necessarily' *for the purpose of earning income*—such expenses have, of course, been held to be deductible here: cf. *Anglo-Persian Oil Co., Ltd.* v. *Dale* [1932] 1 K.B. 124.

Enough has been said to show the value of this excellent work to tax practitioners here as well as in Canada. It should be added that, as a result of pressure by the commercial community, section 6 (1) (*a*) has been stricken out of the new Canadian Income Tax Act and replaced by a subsection which prohibits any deduction in respect of 'an outlay or expense to the extent that it was not made or incurred in gaining or producing income from property or a business'; subject to this rule it is now expressly provided that 'income . . . is to be determined in accordance with generally accepted accounting principles', the effect of which is, according to the authors, to bring the statutory law of income taxation in accord with what they term its 'common law'.

A. Farnsworth.

The County Court Pleader: A Guide to Pleadings and Procedure in Actions in the County Courts with Precedents of Claims and Defences. By Alexander Cairns, Barrister-at-Law. Second Edition by E. Dennis Smith, ll.m., of Gray's Inn and the Oxford Circuit, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. and Stevens & Sons, Ltd. 1949. xxlx and 779 pp. £2 12s. 6d. net.]

Since their creation in 1846 county courts have become increasingly important tribunals. Their present field of jurisdiction is both vast and complex and limited only in amount. If the recent recommendations of the Interim Report of the Committee on Supreme Court Practice and Procedure are accepted county courts will become the primary tribunals for claims up to £300.

The second edition of Cairn's *County Court Pleader* is therefore particularly welcome at this juncture when the increasing jurisdiction of county courts makes it all the more important that the work done in those courts should be performed with corresponding efficiency and technical skill. Litigants in county courts too often tend to look upon pleadings as legalistic trappings instead of as essential machinery in the process of deciding an issue fairly and expeditiously.

The precedents of pleadings collected in the book under review, if used intelligently as models and not as precepts to be copied slavishly, should be of great value to county court practitioners, solicitors and barristers alike. They are comprehensive, simple yet correct, and well arranged and classified.

It is at least open to doubt whether the book would not have served its purpose equally well, if indeed not better, if the introductory notes under each heading had been omitted altogether. While these notes are within their limited scope undoubtedly very good they are, because of their incompleteness, dangerous to a lazy or an uninformed practitioner and useless to the better type of practitioner who would not take his law from a book such as this in any event. To take one example: the note dealing with 'greater hardship cases' on p. 425 contains the names of only five cases (without giving their respective references in the All England Law Reports or the Times Law Reports, which is an unfortunate omission throughout the book). These five cases, not particularly fundamental in themselves, are of course not in any degree exhaustive of the subject. Hence, I venture to think that this note is both dangerous as well as useless to a practitioner. The same criticism is applicable to most of the other notes.

However, it is the pleadings and not the notes which a reader will primarily want and they are worth having in any library.

H. B. Grant.

The Law of Housing and Planning and Allied Subjects. By John J. Clarke, m.a., f.s.s.. Fifth Edition. [London : Sir Isaac Pitman & Sons, Ltd. 1945. lv and 496 pp. (and index 35). 50s.]

The theme of this book is admirable, namely to give in one volume the law of Town and Country planning and of other cognate functions of local authorities, particularly housing and highways, so that a general picture is presented. It must be confessed, however, that the result is disappointing. Partly, perhaps, this is the fault of the book's origin which the preface indicates lay in lecture notes. That form still governs much of the book and does not help reading or understanding. A heading such as that of 'Leading Legal Decisions' followed by a short list of cases distracts from the discussion and, without more, satisfies neither the lawyer nor non-lawyer student (for whom the book is also designed). The result is that although the book contains much that is useful it is presented in a most difficult form. The difficulties are enhanced by the inclusion of old material without a clear indication that it is no longer effective. Thus at p. 114 there is a reference to the Central Advisory Water Committee with its old terms of reference and former chairman which is unhelpful without reference to the present committee with different functions (which is much more summarily dealt with at p. 117). Similarly, although the main features and defects of the 1932 Town Planning Act are no doubt relevant, much of the detail could now surely be omitted.

A clearer picture would emerge if the historical material were put together as also other cognate material. Thus there seems no reason for the interposition of a chapter on easements between one on the Acquisition of Land and one on compensation on compulsory acquisition. Similarly, on Site Planning, Chapter 38 should be related back to the development plan under the 1947 Act. There are, too, a few curious passages such as the rule in *Rylands* v. *Fletcher* following immediately under the heading 'Negligence'. *Fisher* v. *Ruislip R. D. C.* is unfortunately left as it was after the decision in the court of first instance, and the 'use' might now be left out as a mode of creating easements. One would have also liked the story of National Parks at p. 458 to have been carried a little further and to have seen some hint of the Housing Act, 1949, though clearly the Act itself was too late to be dealt with.

These criticisms are made since it is felt that the book could fill its purposes better without too great labour, but they do not detract from the solid bulk of material which the author gives.

J. D. B. Mitchell.

The National Health Service Act, 1946, Annotated Together with Various Rules and Regulations made Thereunder. By S. R. Speller, ll.b., Barrister-at-Law. [London : H. K. Lewis & Co., Ltd. 1948. xii, 498 and xc pp. 42s. net.]

In this work, Mr. Speller has given us a straightforward commentary on the National Health Service Act, 1946, and the Rules and Orders made under it. The book raises, in acute form, a problem that is becoming increasingly perplexing, *viz.*, how to give an up-to-date account of the branches of the law, particularly of administrative law, that undergo rapid transformation. The difficulties are, on the one hand, aggravated by the current delays in book production, and, on the other hand, lessened by publications like Butterworth's *Emergency Legislation Service* and *Current Law*. Mr. Speller found himself in the dilemma of having to choose between publication as soon as possible after the Royal Assent to the Act or waiting for the most important

delegated legislation under it. The solution adopted, *viz.*, waiting for the bulk of that legislation only, would seem to have been the most sensible one, and that resulting in the most useful book. The author has also provided a supplementary index to Statutory Instruments which were published too late for inclusion in the body of the work.

The structure of the work conforms to what may be termed the orthodox pattern. The Act is reprinted with detailed notes to each section. This is followed by the relevant Statutory Rules and Orders and Statutory Instruments which are annotated also, though obviously less extensively than the Act itself. Finally there is an index giving references both to the relevant section(s) of the Act or Instrument and to the page(s) in the book, and at the very end the supplementary index referred to above. The notes are clear, concise, and adequate, as is also the index; Mr. Speller's book is a useful and reliable guide to the relevant legislation. In one respect only does the reviewer think it capable of improvement in a new edition, *viz.*, by the insertion of a short introduction giving the background to the Act as well as an outline of its scope, purpose, and effect.

W. A. Steiner.

A Supplement to Town and Country Planning Law. By James Kekwick, Barrister-at-Law. [London : Stevens & Sons, Ltd. 1949. viii and 325 pp. 25s. Main work with Supplement 60s.]

The main work was reviewed in Vol. II at p. 374, when it was suggested that the early publication of so elaborate a commentary was premature. The disadvantages have been to some extent minimised by delaying publication of the proposed supplements until all the main regulations can appear in one volume. At the same time, this contains no less than fifty pages of noter-up to the main volume and most of these notes are too lengthy to be interleaved even if the busy practitioner could find the time to do so. The present result therefore is not the most convenient of treatises, and it is to be hoped that when it goes out of print the learned author will give us a consolidated edition.

In the meantime, the Supplement is probably more useful than the main volume, partly because the regulations, orders and forms are not so readily accessible elsewhere, and partly because Mr. Kekwick has been able to devote more mature thought to its preparation. Practitioners are likely to find particularly valuable the summary in the Introduction of the various activities which a landowner may undertake without planning consent and/or without payment of a development charge.

Russell on Arbitration. Fourteenth Edition by Ernest Wetton, Barrister-at-Law. [London : Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1949. li and 537 pp. £3 10s.]

The new edition of this, the leading textbook on Arbitration, marks the centenary of the first edition. The general arrangement of the book remains unchanged, but it has been brought up-to-date both by incorporating references to a large number of new cases (of which *Heyman* v. *Darwins, Ltd.* [1942] A.C. 356 is the most important) and to the arbitration provisions of recent statutes. The numerous appendices include the rules of the London Court of Arbitration as amended in 1948.

Copyright. By T. A. Blanco White, Barrister-at-Law. [London : Stevens & Sons, Ltd. 1949. viii and 90 pp. 4s.]

This excellent little book fully maintains the high standard of the 'This is the Law' series. It may perhaps be doubted whether it will be as readily intelligible to the uninstructed lay reader as some of its predecessors, but this is mainly due to the technicality of the subject though it may perhaps be doubtful whether the learned author's practice of illustrating his material with rather unpractical examples (*e.g.*, p. 41) is best suited to such readers. Be that as it may, there can be no doubt that the book (which is full of meat) will be invaluable to publishers and others who already have some background knowledge, and that it should be useful to lawyers and law students who want a handy guide to the general principles of the subject.

Landlord and Tenant. By R. Borregaard. Second Edition. 'This is the Law' Series. [London : Stevens & Sons, Ltd. 1949. x and 102 pp. (with index). 4s.]

This second edition of a useful little book brings its law up to the end of 1948. Like all this series it is primarily intended for laymen and not least of its merits are therefore the way in which it draws attention to dangers of which they might be otherwise unaware and the care which has been taken not to mislead by too dogmatic statements or too firm generalities. In this respect the revised chapter on upkeep and use is a great improvement. Perhaps it will in a future edition be possible to expand the chapter on rent control without getting too deeply enmeshed in its complications; thus, for example, the inability to reduce the rent of furnished premises below the standard rent seems a point worth emphasising. This is certainly a book well calculated to prevent over-anxious tenants repenting later of too hasty agreements.

Proving a Will. By Edgar A. Philips, o.b.e., ll.b. 'Oyez Practice Notes, No. 9.' [London : The Solicitors' Law Stationery Society, Ltd. 1949. 104 pp. (with index and tables). 7s. 6d.]

This is, as is to be expected from the author, a careful and accurate outline guide to Probate Practice which should prove of great assistance. Mainly it is concerned with the formalities necessary before Probate, and the length with which the author has dealt with the executor's oath will be welcome to those unversed in the peculiarities of some of the requirements of the Probate Registry since the information given is clear and useful, though the utility of the note on p. 90 that 'There is a sub-registry at Canterbury. It is closed at the present time' may be doubtful.

It would be wrong to look for too much substantive law in a book such as this, but perhaps space should have been found for a reference to the exceptional cases where property may be dealt with without a grant, and the wide meaning of 'soldier' might have been mentioned as well as the discussion of the phrase 'actual military service'. Perhaps, too, the reference at p. 50 to 'money' as a word judicially interpreted might be misleading as implying a certainty which does not exist. The booklet is well produced with an adequate index and useful table of fees and is an admirable addition to the series.

Town and Country Planning Law. By J. Kekwick & R. S. W. Pollard. Second Edition. 'This is the Law' Series. [London : Stevens & Sons, Ltd. 1949. 139 pp. (with index). 4s.]

In the new edition this short guide has been brought up to date and slightly enlarged by including discussion of some of the principal Statutory Instruments which have appeared since it was first published; otherwise its form remains substantially the same. It might in future be worth giving detailed references to these Instruments, a small matter but one likely to be welcomed by general readers who may nevertheless wish to refer to originals. The additions have been carefully made so that the clarity and simplicity of the book has been preserved.

Agricultural Holdings. By R. Borregaard, m.a., Barrister-at-Law. 'Oyez Practice Notes, No. 11.' [London : The Solicitors' Law Stationery Society, Ltd. 1948. 88 pp. 6s.]

This book lives up to the high standard of utility of these notes; it takes the form of an exposition of the Agricultural Holdings Act, 1948, rather than a commentary, but some of the obvious changes in the law are emphasised. The provisions are well set out in a way making for easy understanding and it should prove useful for ready reference though an index would have supplemented the full table of contents.

Stein-Jonas, Kommentar zur Zivilprozessordnung. Seventeenth Edition. By Adolf Schoenke. [Tuebingen : J. C. B. Mohr (Paul Siebeck). 1949. First and Second Instalment.]

Adolf Schoenke, Zivilprozessrecht. Sixth Edition. [Karlsruhe : C. F. Mueller. 1949. 503 pp.]

Stein-Jonas is the leading commentary on what corresponds in Germany to the Rules of the Supreme Court. The new edition of this standard work, of which the first and second instalments have now appeared, is in the charge of the indefatigable Professor of Civil Procedure and Criminal Law at Freiburg University, who can indeed be relied upon to bring the work up to date. For the non-German lawyer it can hardly be of interest. It is noteworthy, however, that the new edition occasionally contains observations on foreign, particularly French, practice. The technical set-up is remarkable. The book is in loose-leaf form so that alterations and additions are facilitated and the necessity for purchasing succeeding new editions is dispensed with. This would seem to be a method the adoption of which might well be considered by the editors and publishers of our *Annual Practice*.

The second of the above books is a new edition of Professor Schoenke's textbook on Civil Procedure. It is a reliable and well-documented guide which is remarkably free from mere theoretical speculation. All the changes effected by the occupation authorities are noted.

F. A. Mann.

Oyez Practice Notes : Naturalisation (No. 12) by J. F. Josling ; and Notes on Chancery Practice (No. 13) by F. G. R. Jordan. [London : The Solicitors' Law Stationery Society, Ltd. 1949. 78 and 87 pp. respectively. 6s. each.]

Many practitioners will welcome these two little books. Mr. Josling prints the British Nationality Act, 1948, and the Regulations and Forms made there-

under and writes a short commentary on the methods of voluntarily acquiring British nationality in the United Kingdom. Mr. Jordan gives a useful survey of Chancery Practice which will be appreciated by those who do not always find the time to work their way through Daniell or the *Annual Practice*.

F. A. M.

Karl Bernhard Graf, Die Grundrechte der Staaten im Voelkerrecht. [Basel : Helbing & Lichtenhahn. 1948. 208 pp.]

This little book which served as a thesis submitted to the University of Basle contains a report on the present position of the problem of the fundamental rights of States. The author arrives at the conclusion that such rights do not exist except in an organised society of States such as may develop in future. It does not appear that the author has succeeded in making a substantial or really new contribution to a familiar subject.

F. A. M.

Other Publications received:—

A Handbook on the Death Duties. By H. Arnold Woolley. Supplement to the Sixth Edition. By J. H. Munkman, ll.b. [The Solicitors' Law Stationery Society, Ltd. 2s. 6d.]

The Elements of Roman Law. With a Translation of the Institutes of Justinian. By R. W. Lee, d.c.l., f.b.a. Second Edition. [Sweet & Maxwell, Ltd. 1949. 25s.]

Industrial Law. By H. Samuels, m.a. Fourth Edition. [Sir Isaac Pitman & Sons, Ltd. 16s.]

The Law of Trade Unions. By H. Samuels, m.a. Fourth Edition. [Stevens & Sons, Ltd. 7s. 6d.]

The Principles of Mercantile Law. By J. Charlesworth, ll.d. Seventh Edition. [Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 15s.]

Report of the British Council, 1948–1949.

The University of Notre Dame. The Third Natural Law Institute. Sponsored by Alick A. Gould.

International Monetary Fund. Annual Report. [Washington, U.S.A. 1949.]

International Monetary Fund. Schedule of Par Values. Ninth Issue. [Washington, D.C. 1949.]

L'Archivio Storico del Banco di Napoli. By Salvatore Ingrosso.

The Register of Registrars, 1950. [Day's Publications and Services, Ltd. 35s.]

Vom Irrenden Gewissen. Hans Welzel. [Tübingen. J. C. B. Mohr. DM.1.50.]

Einführung in die Rechtswissenschaft. Adolf Schönke. [Karlsruhe. C. F. Müller. DM.9.]

Revista del Instituto de Derecho Civil. Tomo 1, No. 3. Universidad Nacional de Tucumán.

Enneccerus. Recht der Schuldverhältnisse. Thirteenth Edition. [Tübingen. J. C. B. Mohr. DM.16.]

Australian Law Journal. Volume 23. Nos. 4 & 5. [The Law Book Company of Australasia Pty., Ltd.]

Powers of Attorney. C. Caplin. Oyez Practice Notes. [The Solicitors' Law Stationery Society, Ltd. 6s.]

British Year Book of International Law, 1948. [Oxford University Press. 45s.]

Hill & Redman's Complete Law of Landlord and Tenant. Second Cumulative Supplement to Tenth Edition. [Butterworth & Co., Ltd. 1949. 7s. 6d.]

Um Die Finale Handlungslehre. Hans Welzel. [Tübingen. J. C. B. Mohr. DM.1.50.]

Comparative Law. By H. C. Gutteridge. Second Edition. [Cambridge University Press. 15s.]

Boletin. Ministerio de Justicia de la Nacion. Añol, No. 3. [Direccion de Publicaciones. Buenos Aires: Republica Argentina.]

Rhyming Relics of the Legal Past: With Introduction by L. G. Horton-Smith, m.a., 26 Rivercourt Road, Ravenscourt Park, London, W.6. Price 1s. 9d. net.

The U.N. By-Passes the International Court as the Council's Adviser. By Louis B. Dehl. Reprinted from University of Pennsylvania Law Review.

Society and Abortion. By Dr. Eustace Chesser. [Abortion Law Reform Association.]

Summary Judgment in the High Court. By J. F. Josling. Oyez Practice Notes, No. 16. [The Solicitors' Law Stationery Society, Ltd. 3s. 6d. net.]

Costs in Arbitration. By J. L. R. Robinson. Oyez Practice Notes, No. 18. [The Solicitors' Law Stationery Society, Ltd. 6s. 6d. net.]